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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 431.

THE UNITED STATES, PETITIONER

vs.

JOSEPH H. BEUTTAS, JOHN W. BEUTTAS, AND PAUL H. BEUTTAS, TRADING AS B-W CONSTRUCTION CO., NOT INC.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED SEPTEMBER 5, 1944
CERTIORARI GRANTED NOVEMBER 20, 1944

SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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In the Court of Claims of the United States

No. 44978

JOSEPH H. BEUTTAS, JOHN W. BEUTTAS, AND PAUL H. BEUTTAS, TRADING AS B-W CONSTRUCTION CO., NOT INC.,

vs.

THE UNITED STATES OF AMERICA.

Petition

Filed October 20, 1939

To the Honorable, Chief Justice and Associate Justices of the United States Court of Claims:

Plaintiffs, Joseph H. Beuttas, John W. Beuttas, and Paul H. Beuttas, trading as B-W Construction Co., not Inc., respectfully represent:

1

Plaintiffs, Joseph H. Beuttas, John W. Beuttas and Paul H. Beuttas, trading as B-W Construction Co., not Inc., are residents of the State of Illinois and citizens of the United States,
2 having their principal place of business at 307 North Michigan Avenue, Chicago, Illinois; there has been no action upon this claim, other than as herein stated, in Congress or by any of the departments of the government; the plaintiffs are the sole owners of the claim herein presented; no assignment or transfer of said claim, or of any part thereof or interest therein has been made; plaintiffs are justly entitled to the amount herein claimed from the United States of America after allowing all just credits and off-sets; plaintiffs have at all times borne true allegiance to the government of the United States and have not in any way voluntarily aided, abetted, or given encouragement to rebellion against said government; and plaintiffs believe the facts as hereinafter stated to be true.

2

On or about November 26, 1935 the defendant, by its duly authorized agent, Horatio B. Hackett, Assistant Administrator for Federal Emergency Administrator of Public Works, entered into a written contract with the plaintiffs for the construction of the Foundations of the Jane Addams Houses, Project No. H-1405, in Chicago, Illinois, at the stated contract price of $104,890.00,

which sum was subject to adjustment in accordance with unit prices established in said contract and as further provided by said contract and the specifications, including the Addenda thereto. A true and correct copy of said contract is attached hereto, made a part hereof and marked "Exhibit A."

3

The plaintiffs fully and completely performed, in accordance with the provisions of said contract and the specifications, schedule and drawings forming a part thereof, all of the work required to be done thereunder which was duly accepted by the defendant. Whereupon, plaintiffs became entitled to the full amount of compensation fixed and agreed upon in and by said contract, as amended, to wit, $104,890.00, in addition, to further amounts hereinafter set forth.

4

That said contract of November 26, 1935, provided among other things that "the work shall be commenced upon receipt by the contractor of notice to proceed and shall be completed within seventy-five (75) calendar days after receipt by the contractor of such notice."

That on or about, to wit, the 15th day of November 1935, the defendant, by long-distance telephone call from Washington, D. C., to Chicago, Illinois, ordered the plaintiffs to have a power shovel on the job the following morning, and that on the following morning, that is, to wit, November 16, 1935, the plaintiffs did have a power shovel operating in the performance of said contract.

That thereafter, the plaintiffs received a letter from the
4 Federal Emergency Administration of Public Works, signed by C. A. Inham, District Manager, By Jas. H. Grier, Project Manager, dated on, to wit, November 21, 1935, reading as follows:

"In answer to your letter to me of November 19, 1935, relative to disposal of excavated material on Project H-1405, suggesting the removal of surplus excavation from the premises during excavation, I advise you that your letter concerning this subject has been referred to the Director of Housing in Washington for his decision, and I am in receipt of telegraphic instructions in answer.

"I am directed to advise you that 'specification terms with regard to stacking excavated material must be followed,' namely: that the material is to be stacked at site fourteen naught five (1405)."

"With this information at hand, please arrange to proceed with the work under your contract for Foundations for Jane Addams Houses Project H-1405, as outlined in the Plans and Specifications."

Pursuant to said notice plaintiffs made immediate preparations for commencement of work under the contract and were prepared to immediately commence and diligently prosecute their work under said contract on said date.

Thereafter, on, to wit, December 12, 1935, the defendant notified the plaintiffs to stop all work, as the defendant desired to make considerable changes in the plans and specifications, and did not permit the plaintiffs to continue with the performance of said contract until on, to wit, February 17, 1936, at which time the plaintiffs received a letter from the Federal Emergency Administration of Public Works dated February 12, 1936, signed by A. R. Clas, Director of Housing, and approved by Horatio B. Hackett, Asst. Administrator, reading as follows:

"With reference to your contract No. E. R. P. W. 110.171, dated November 26, 1935, covering demolition and foundation work at the above project, you are instructed to proceed at once with the work under this contract, as modified by the following revised drawings:

"FC-1 to FC-14, inclusive, dated November 20, 1935.

"An equitable adjustment of your contract price and time will be made as provided in the contract, and a formal Change Order issued, modifying your contract accordingly.

"This modification is ordered upon the express condition that it is subject generally to all the contract stipulations and covenants; that it is without prejudice to any and all rights of the United States of America under the contract and bond; and that you shall obtain the formal consent of your sureties to this modification."

During the period from December 12, 1935, to February 17, 1936, plaintiffs were required to and did remain on the job, and hold themselves in readiness to commence construction work at any time. Despite numerous and repeated requests by plaintiffs of defendant and its representatives for instructions and information as to the commencement of construction work, no definite information or instructions were received until, to wit, the 17th day of February 1936.

6 6

As a result of said delay in the commencement of the work, for which plaintiffs were not in any wise responsible, and which

was in violation of said contract and constituted a breach thereof by defendant, plaintiffs suffered severe loss and damage by reason of the necessity of maintaining its staff and equipment during the period from December 12, 1935, to February 17, 1936; increase of wage rates due to said delay; and increased cost of removal of certain earth due to frost penetration, at considerable additional expense and cost to plaintiffs, all to the loss and damage of plaintiffs in the sum of $20,000.00.

7

That on, to wit, the 25th day of June 1936 the defendant issued its Change Order No. 1, for which the defendant paid the plaintiffs the sum of $887.20; but, in arriving at said amount, failed to include therein the usual 10% for overhead and 10% for profit, amounting in all to the sum of $186.32, all to the loss and damage to the plaintiffs in the sum of $186.32.

8

That during the performance of said contract it became necessary for the plaintiffs to remove certain hidden obstructions within the foundation, the fair and reasonable value of the work necessary in order to remove said obstructions being the
7 sum of $523.36, but that the defendant refused to pay the said sum of $523.36, claiming that the fair and reasonable value thereof was only the sum of $368.08, all to the loss and damage of the plaintiffs in the sum of $155.28.

9

That the said contract provides, among other things, as follows (Article 19 (a)):

"The wage rates established in the specification shall be subject to change by the Federal Emergency Administration of Public Works. In the event that the Federal Emergency Administration of Public Works establishes different wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the contractor, whether under this contract or any subcontract."

That subsequent to the execution of said contract on, to wit, January 8, 1936, the Federal Emergency Administration of Public Works did establish different wage rates by increasing the same, as a result of which the plaintiffs were compelled to pay said increased rates and thereby were put to increased cost to the extent of $6,396.00, notwithstanding which the contract price was not adjusted on the basis of actual labor costs to the plaintiffs, all to the loss and damage to plaintiffs in the sum of $6,396.00.

10

The plaintiffs performed said work under said contract, and said work was accepted by the defendant, acting through its
8 officers and agents authorized to accept the same, and the defendant received and has ever since enjoyed the benefit thereof at the expense of and damage to the plaintiffs. Plaintiffs aver that defendant is responsible for all of the expense and costs to which the plaintiffs were subjected, as hereinbefore set forth, whereby and by reason of which an obligation arose and still exists on the part of the defendant to pay plaintiffs just and reasonable compensation therefor. Plaintiffs, however, have not been paid on account of any expense and costs.

Wherefore, plaintiffs claim that they are justly entitled to recover the sum of $26,737.60 and, accordingly, pray judgment in their favor against the United States for said amount.

/s/ Joseph H. Beuttas
Joseph H. Beuttas
/s/ John W. Beauttas
John W. Beauttas
/s/ Paul H. Beauttas
Paul H. Beauttas

[*Duly sworn to by Joseph H. Beauttas et al., jurat omitted in printing.*]

9 /s/ William F. Kelly
William F. Kelly
/s/ P. J. J. Nicolaides
P. J. J. Nicolaides
Attorneys for Plaintiffs,
740-15th Street N. W.

10 *Exhibit "A" to petition*

ERPW 110 171
Contractor's Copy

Division I

United States Government Form of Contract

(Federal Emergency Administration of Public Works Projects)

FIXED PRICE CONTRACT

Housing Division, Form No. P. W. F. C. 2

Approved by the Federal Emergency Administrator of Public Works July , 1935.

HOUSING DIVISION,

HOUSING DIVISION,
(*Department*)

B-W CONSTRUCTION Co., Not Inc.
(*Contractor*)

CONTRACT FOR: Construction of Foundations, Jane Addams Houses, Project No. H-1405
AMOUNT: $104,890.
SITE OF THE WORK: Chicago, Illinois.
CONTRACT No.: ERPW 110.171

87909 Nov. 29 '35

Page 1 of Housing Division Form P. W. F. C. 2.

DIVISION I.

This contract, entered into this 26th day of November, 1935, by the United States of America, hereinafter called the Government, represented by the Contracting Officer executing this contract, and B-W Construction Co., Not Inc., a partnership consisting of Joseph H. Beuttas, John W. Beuttas, and Paul H. Beuttas, trading as B-W Construction Co., Not Inc., of the city of Chicago in the State of Illinois hereinafter called the Contractor, witnesseth that the parties hereto do mutually agree as follows:

ART. 1. Statement of work: The Contractor shall furnish all labor and materials and perform all work required for the construction of the foundations of the Jane Addams Houses, Project No. H-1405, in Chicago, Illinois, for the consideration of the sum of One Hundred Four Thousand Eight Hundred Ninety Dollars ($104,890) which sum is subject to adjustment in accordance with unit prices established herein and as further provided by this contract and the Specifications, including the Addenda thereto, all in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: Specification for construction of foundations for Jane Addams Houses, Project H-1405, Chicago, Illinois, including Addenda Nos. 1, 2, 3, and 4 thereto and Drawing No. F-1 to F-4 inclusive.

UNIT PRICES:

The following unit prices, representing the total unit cost to be charged to or credited by the Government are to be used for

changes ordered under this contract as specified under Alternates Nos. 1 and 2:

	Add	Deduct
Alternate No. 1:		
Additional services per week	$350	
Alternate No. 2:		
Nipples—each—complete in place:		
2 inch	1.25	$1.00
1½ inch	1.00	.75
1¼ inch	1.00	.75

(Construction of Foundations, Jane Addams Houses, Project No. H-1405.)

Page 2 (a) of Housing Division Form P. W. F. C. 2.

Division II

Sec. 47. Unit Prices—Foundation Work:

The following unit prices are hereby established for use as a basis for the adjustment of the contract price for changes in foundation work only. These units are estimated base costs and allowance for overhead and profit will be computed as set forth hereinafter:

Shovel Excavation	Per Cu. Yd. $0.60
Hand Excavation to 5'-0" Depth	" " " 2.00
" " below " " , Per ft. depth extra	" " " .45
Back Fill	" " " .45
Remove Surplus Earth from Site	" " " .50
Sheeting Bank	" Sq. Ft. .25
4" Foot Drains (including Fittings)	" Lin. Ft. .25
Reinforcing (Including Accessories)	" Ton 80.00
#8 Wire 6" x 6" Mesh	" Sq. Ft. .03
2,000 lb. Concrete	" Cu. Yd. 8.75
3,000 lb. "	" " " 9.40
1 . 5 . 7 "	" " " 8.10
13 Footing Forms	Per Sq. Ft. .14
Foundation Wall Forms (Incl. Pilasters)	" " " .16
Column Forms	" " " .18

Excavation prices are based on excavation being earth as defined in Sec. 5, Div. III "Excavating" of the specifications. For the computation of quantities involved in foundation changes ordered, the following general rules shall apply:

1. General excavation shall be assumed to be 2' 0" outside of wall lines.

2. Excavation for footings shall be assumed to be 6" outside of concrete lines.

3. Trenches for walls shall be assumed to be 2' 0" wider than the wall thickness but in no case less than 3' 0" in width.

4. The value of hand excavation shall be computed from the level at which hand excavation starts, and shall be generally considered as being 1' below the basement floor line, if any.

5. Form work quantities shall be based on contact area.
6. Concrete quantities shall be based on sizes shown on drawings.

Page 18 of General Conditions P. W. 43031.
(Construction of Foundations, Jane Addams Houses, Project No. H-1405.)
Page 2 (b) of Housing Division Form P. W. F. C. 2.

14 DIVISION II

7. Reinforcing steel unit prices are based on average conditions of sizes and bending and are for steel in place including all accessories.

8. Sheeting for hand excavation contemplates the cost of bank protection where required due to loose soil conditions and shall not be applied to superficial bank bracing, the cost of which is included in the excavation units.

SEC. 48. Unit Prices to be Submitted:

Basic unit prices covering any other classification of the contract work shall be submitted by the Contractor to the Contracting Officer within a reasonable time if requested by the Contracting Officer. These basic unit prices shall be the closest possible estimate of the actual cost of labor and materials required for the execution of the work involved. They shall be subject to the approval of the Contracting Officer and if so approved they shall be used as a basic cost for computing the adjustment to the contract price should changes in the plans and specifications be made as provided for in the contract.

SEC. 49. Contract Price Adjustment Due to Changes Ordered:

In the event that changes are ordered by the Contracting
15 Officer, as provided for in the contract, the contract price shall be adjusted, using as a basic cost the approved basic unit prices wherever applicable, or actual costs which are substantiated to the satisfaction of the Contracting Officer. In addition to the costs so determined the Contractor will be allowed overhead and profit for net additional work in accordance with the following policy:

1. Overhead and profit will be allowed on the net additional costs after deducting all credit items.

2. For changes resulting in a net additional cost up to $10,000:

a. On work performed by the Contractor: Cost plus 10% overhead plus 10% profit.

b. On work performed by a subcontractor: Cost to the Contractor plus a single 10% for overhead and profit, the cost to the Contractor being assumed as the net basic cost plus 10% plus 10%.

3. Any change that results in a net omission shall be credited to the Government at the actual cost without the addition of overhead and profit percentages.

4. The basic cost plus the above mentioned percentages allowed for overhead and profit shall be the entire cost to the Government for any change made under the contract.

Page 19 of General Conditions P. W. 43031
(Construction of Foundations, Jane Addams Houses, Project No. H-1405)
Page 2 (c) of Housing Division Form P. W. F. C. 2.

16 DIVISION II

5. Any change involving a net addition or deduction in excess of $10,000 will be adjusted by individual consideration.

These policies of the establishment of basic unit prices and contract price adjustment relate to changes which are ordered to be performed concurrently with the contract work and shall apply to normal and ordinary changes under the contract but shall not be applicable in those instances where, because of unusual circumstances or advancement of the work involved, an adjustment based on established unit prices would be unfair or inequitable, in the opinion of the Contracting Officer, to the Contractor or the Government.

Page 20 of General Conditions P. W. 43031
(Construction of Foundations, Jane Addams Houses, Project No. H-1405)
Page 2 (d) of Housing Division Form P. W. F. C. 2.

The work shall be commenced upon receipt by the Contractor of "Notice to Proceed" and shall be completed within seventy-five (75) calendar days after receipt by the Contractor of such notice.

ART. 2. Specifications and drawings: The Contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the Contracting Officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the
17 specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy in the figures or drawings, the matter shall be immediately submitted to the Contracting Officer, without whose decision said discrepancy shall not be adjusted by the Contractor, save only at his own risk and expense. The Contracting Officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise pro-

vided. Upon completion of the contract the work shall be delivered complete and undamaged.

ART. 2. Changes. The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this Contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this Contract, or

Page 2 of Housing Division Form No. P. W. F. C. 2

in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than $600 shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered, unless the Contracting Officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute
18 shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the Contractor from proceeding with the prosecution of the work so changed.

ART. 4. Changed conditions: Should the Contractor encounter, or the Government discover during the process of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the Contracting Officer shall be called immediately to such conditions before they are disturbed. The Contracting Officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specification, he shall at once, with the written approval of the head of the department or his representative, make such changes in the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in article 3 of this Contract.

ART. 5. Extras: Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the Contracting Officer and the price stated in such order.

ART. 6. Inspection: (a) All material and workmanship (if not otherwise designated by the specifications) shall be sub-
61 ject to inspection, examination, and test by Government inspectors at any and all times during manufacture and (or) construction and at any and all places where such manufacture and (or) construction are carried on. The Government shall have the right to reject defective material furnished by the Contractor and workmanship or require its correction. Rejected

workmanship shall be satisfactorily corrected and rejected material furnished by the Contractor shall be satisfactorily replaced with proper material without charge therefor, and the Contractor shall promptly segregate and remove the same from the premises.

(b) The Contractor shall furnish promptly without additional charge all reasonable facilities, labor, and materials necessary for the safe and convenient inspection and test that may be required by the inspectors. All inspection and tests by the Government shall be performed in such manner as not to unnecessarily delay the work. Special, full size, and performance tests shall be as described in the specifications. The Contractor shall be charged with any additional cost of inspection when material and workmanship is not ready at the time inspection is requested by the Contractor.

(c) Should it be considered necessary or advisable by the Government at any time before final acceptance of the entire work to make an examination of work already completed, by removing or tearing out same, the Contractor shall on request promptly furnish all necessary facilities, labor, and material. If such work
20 is found to be defective in any material respect, due to fault of the Contractor or his subcontractors, he shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, the actual cost of labor and material necessarily involved in the examination and replacement, plus 15 percent, shall be allowed the Contractor and he shall, in addition, if completion of the work has been delayed thereby, be granted a suitable extension of time on account of the additional work involved.

(d) Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment whenever the quantity justifies it, unless otherwise stated in the specifications; and such inspection and acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, departures from specific requirements of the contract and the specifications and drawings made a part thereof, damage or loss in transit, fraud, or such gross mistakes as amount to fraud. Subject to the requirements contained in the preceding sentence, the inspection of material and workmanship for final acceptance as a whole or in part shall be made at the site.

(e) Materials furnished by the Government shall be inspected by the Contractor as promptly after delivery thereof as possible and he shall, before incorporating the same in the work and in no event later than fifteen days after delivery, notify the Contracting Officer of any materials found by him to be defec-
21 tive or unsuited for the purpose for which intended. No

claim of the Contractor on account of any such material shall be allowed unless notice as above prescribed is given, except in such cases where a careful inspection by the Contractor could not disclose the nature of the defect. In the event the Contractor shall believe any such material to be defective or unsuited for the purpose intended he shall not use the same unless directed so to do by the Contracting Officer. Upon receipt of notification that any material is defective or unfit, the Contracting Officer shall inspect the same and if the same be in his opinion defective or unfit the Government will without cost to the Contractor furnish to him other and suitable material. Should the Contracting Officer find the material suitable for the purposes intended, he shall direct the Contractor to incorporate the same in the work. The Contractor shall not be liable, except for workmanship thereon,

Page 3 of Housing Division Form No. P. W. F. C. 2

for any materials furnished by the Government and incorporated in the work where he has notified the Contracting Officer within the time above provided that such materials are defective or unfit or where because of the nature of the defect the same could not be discovered by the Contractor by a careful inspection of the same.

ART. 7. (a) Materials and workmanship: Unless otherwise specifically provided for in the specifications, all workmanship, equipment, materials, and articles incorporated in the work covered by this contract are to be of the best grade of their respective kinds for the purpose. Where equipment, materials, or
22 articles are referred to in the specifications as "equal to" any particular standard, the Contracting Officer shall decide the question of equality. The Contractor shall furnish to the Contracting Officer for his approval the name of the manufacturer of machinery, mechanical and other equipment which he contemplates installing, together with their respective performance capacities and other pertinent information. When required by the specifications, or when called for by the Contracting officer, the Contractor shall furnish the Contracting Officer for approval full information concerning the materials or articles which he contemplates incorporating in the work. Samples of materials shall be submitted for approval when so directed. Machinery, equipment, materials, and articles installed or used without such approval shall be at the risk of subsequent rejection. The Contracting Officer may require the contractor to dismiss from the work such employee as the Contracting Officer deems incompetent, careless, insubordinate, or otherwise objectionable.

(b) Domestic materials: In the performance of this work the Contractor, subcontractors, material men, or supplies shall use

only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, except as provided in the specifications.

23 ART. 8. (a) Superintendence by Contractor: The Contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the Contracting Officer, on the work at all times during progress, with authority to act for him.

(b) The Contractor shall perform directly and without subcontracting not less than twenty-five per centum (25%) of the work, to be calculated on the basis of the contract price and the cost of materials, supplies, and equipment furnished by the Government.

ART. 9. Delays—Damages: If the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the Contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the Contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the Contractor to proceed, the Contractor shall con-

24 tinue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the Contractor shall pay to the Government as fixed, agreed, and liquidated damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers, and the Contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the Contractor to proceed shall not be terminated or the Contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics,

quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: *Provided further*, That the Contractor shall within 10 days from the beginning of any such delay notify the Contracting Officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fa[illegible] justify such an extension, and his findings of facts thereon sh[illegible] be final and conclusive on the parties thereto, subject only to appeal within 30 days by the Contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

25 ART. 10. Permits and care of work: The Contractor shall, without additional expense to the Government, obtain all required licenses and permits and be responsible for all damages to persons or property that occur as a result of his fault or negligence in connection with the prosecution of the work, and shall be responsible for the proper care and protection of all materials delivered and work performed until completion and final acceptance.

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ART. 11. (a) Convict labor: No person currently serving sentence to a penal or correctional institution shall be employed on the project.

(b) Hours of labor: Except (1) in the case of emergency involving the public welfare or the protection of work already done, (2) special and unusual circumstances when the limitations below are not advisable or practicable, and (3) for supervisory and administrative employees the maximum hours of work for persons employed on the project shall be as follows:

(I) for manual labor, 8 hours per day and 130 hours per month;

(II) for clerical and other nonmanual employees, 8 hours per day and 40 hours per week.

(c) Eight-hour law: No laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the Contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work

26 more than 8 hours in any 1 calendar day upon such work at the site thereof. For each violation of the requirements of this article a penalty of $5 shall be imposed upon the Contractor for each laborer or mechanic for every calendar day in which such employee is required or permitted to labor more than 8 hours upon said work, and all penalties thus imposed shall be withheld for the use and benefit of the Government: *Provided*,

That this stipulation shall be subject in all respects to the exceptions and provisions of U. S. Code, title 40, sections 321 and 324, relating to hours of labor.

ART. 12. Covenant against contingent fees: The Contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to terminate the contract, or in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business.

ART. 13. Other contracts: The Government may award other contracts for additional work, and the Contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed
27 by the Contracting Officer. The Contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor.

ART. 14. Officials not to benefit: No Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract or to any benefit that may arise therefrom, but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

ART. 15. Disputes: All labor issues arising under this contract which cannot be satisfactorily adjusted by the Contracting Officer shall be submitted to the Head of the Department. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the Contracting Officer or his duly authorized representative, subject to written appeal by the Contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the Contractor shall diligently proceed with the work as directed.

ART. 16. Payments to Contractors: (a) Unless otherwise provided in the specifications, partial payments will be made as the work progresses at the end of each calendar month, or as soon thereafter as practicable, on estimates made and approved by the Contracting Officer. In preparing estimates the material
28 delivered on the site and preparatory work done may be taken into consideration.

(b) In making such partial payments there shall be retained 10 percent on the estimated amount until final completion and ac-

ceptance of all work covered by the contract: Provided, however, That the Contracting Officer, at any time after 50 percent of the work has been completed, if he finds that satisfactory progress is being made, may make any of the remaining partial payments in full: And provided further, That on completion and acceptance of each separate building, or other division of the contract, on which the price is stated separately in the contract, payment may be made in full, including retained percentages thereon, less authorized deductions.

(c) All material and work covered by partial payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the Contractor from the sole responsibility for the care and protection of materials and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the Government to require the fulfillment of all of the terms of the contract.

(d) Upon completion and acceptance of all work required hereunder, the amount due the Contractor under this contract will be paid upon the presentation of a properly executed and duly certified voucher therefor, after the Contractor shall have furnished the Government with a release, if required, of all claims against the Government arising under and by virtue of this contract, other than such claims, if any, as may be specifically excepted by the Contractor from the operation of the release in stated amounts to be set forth therein.

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(e) The Contracting Officer may withhold from the Contractor so much of accrued payments as may be necessary to pay to laborers or mechanics employed by the Contractor or any subcontractor on the work, the difference between the rate of wages required by this contract to be paid to laborers or mechanics on the work and the rate of wages actually paid to such laborers or mechanics.

ART. 17. Additional security: Should any surety upon the bond for the performance of this contract become unacceptable to the Government, the Contractor must promptly furnish such additional security as may be required from time to time to protect the interests of the Government and of persons supplying labor or materials in the prosecution of the work contemplated by the contract.

ART. 18. Wages: (a) There shall be paid each employee engaged on the project in the trade or occupations listed in the specification, the hourly, weekly, or monthly wage prescribed for the same in the Specification. If, after the award of this con-

tract it becomes necessary to employ any person in a trade or occupation not listed in the Specification, such person shall
30 be paid an hourly, weekly, or monthly rate or wage fairly comparable to the rates contained in the Specification as shall be approved by the head of the department, and such wage rates shall be retroactive to the time of the initial employment of such person in such trade or occupancy.

(b) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work shall be posted in a prominent and easily accessible place at the site of the work, and the Contractor shall keep a true and accurate record of the hours worked by and the wages paid to each employee, and shall furnish the Contracting Officer with a sworn statement thereof on demand. All employees shall be paid in full not less often than once each week and in lawful money of the United States in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process.

ART. 19. (a) The wage rates established in the Specification shall be subject to change by the Federal Emergency Administration of Public Works. In the event that the Federal Emergency Administration of Public Works establishes different wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the Contractor, whether under this contract or any subcontract.

31 (b) The Contractor and each subcontractor shall prepare the pay rolls upon forms to be prescribed and in accordance with instructions to be furnished by the Works Progress Administration. Not later than the third day following the payment of wages, a certified legible copy of each pay roll, whether paid by the Contractor or any subcontractor, shall be transmitted by the Contractor to such office as may be designated by the Works Progress Administration. The Contractor and each subcontractor shall submit reports at such times and on such forms as may be required by the Works Progress Administration, covering purchases of, and requisitions for, materials, together with such other information as may be required to determine the progress and status of the completion of the work on the project.

(c) The Contractor and each subcontractor shall report to the United States Department of Labor monthly within 5 days after the close of each calendar month, upon forms to be prescribed, and in accordance with instructions to be furnished, by the United States Department of Labor, covering the number of per-

sons on their respective payrolls directly connected with the project, the aggregate amount of such pay rolls and man-hours work, and an itemized statement of the total expenditures for materials. The Contractor shall also furnish to the United States Department of Labor the names and addresses of all subcontractors on the work at the earliest date practicable.

(d) The Works Progress Administration through its authorized agents shall have the right to inspect all work as it progresses and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract.

ART. 20. (a) Employment Service: With respect to all persons employed under this contract, except as otherwise provided in Regulation No. 2, issued by Executive Order No. 7060, dated June 5, 1935, (i) such persons shall be referred for assignment to such work by the United States Employment Service, (ii) preference in employment shall be given to persons from the public relief rolls; provided that persons not on public relief rolls may be employed on this project where qualified persons cannot be obtained from the public relief rolls, and provided further, that supervisory, administrative; and highly skilled workers on the project, as defined in the specification, need not be so referred by the United States Employment Service, provided all organized labor, skilled and unskilled, when organized labor is desired and requested by the Contractor, which is employed under this contract shall be supplied by the employment agencies designated by the United States Employment Service (or such other agency for the placement of workers as may be designated by the Federal Works Progress Administrator to act in lieu of the United States Employment Service) from the membership of recognized unions, with preference, first, to those members of such unions who constitute regular employees of the Contractor and who are on the local public relief rolls, second, to other members of such unions who are on the relief rolls, and, upon the exhaustion of union members

on such rolls, to any other members of the union. In the event, however, that qualified workers are not made available from the membership of the unions within 48 hours (Sundays and holidays excepted) after a request therefor is filed by the Contractor, and the employment agency has notified the unions of the receipt of such request, such labor may be chosen by the Contractor from other qualified workers, supplied by employment agencies designated by the United States Employment Service (or such other agency for the placement of workers as may be designated by the

Federal Works Progress Administrator to act in lieu of the United States Employment Service). The provisions of this paragraph are subject to the further requirement that all labor employed under this contract shall be taken from the county in which the project is located, to the extent that labor technically qualified to perform the work is available therein.

(b) Except as specifically otherwise provided in this Contract, workers who are qualified by training and experience and certified for work on the project by the United States Employment Service shall not be discriminated against on any ground whatsoever.

(c) The Contractor shall have the right, subject to disapproval of the Contracting Officer to dismiss any employee.

(d) Only one member of a family group may be em-
34 ployed on work under this Contract, except as specifically authorized by the Works Progress Administration.

ART. 21. Compensation insurance: The Contractor shall provide adequate workman's compensation insurance for all labor employed on the project who may come within the protection of such laws and shall provide, where practicable employers' general liability insurance for the benefit of his employees not protected by such compensation laws, and proof of such insurance satisfactory to the Contracting Officer shall be given.

ART. 22. Persons entitled to benefits of labor provisions: The Contractor will extend to every person who performs the work of a laborer or of a mechanic on the project or on any part thereof the benefits of the labor and wage provisions of this contract, regardless of any contractual relationship between the Contractor and such laborer or mechanic, or between any subcontractor and such laborer or mechanic.

ART. 23. Inspection of records: The Federal Emergency Administration of Public Works and the Contracting Officer, through their respective authorized agents, shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract, and this data shall be made available at the Contractor's project office when requested.

ART. 24. (a) No person under the age of 16 years, and no
35 one whose age or physical condition is such as to make his employment dangerous to his health or safety, or the health and safety of others, may be employed on the project. This paragraph shall not be construed to operate against the employment of physically handicapped persons, otherwise employable, where such persons may be safely assigned to work which they can ably perform.

(b) Wages to be paid or for which reimbursement is to be made by the Federal Government may not be pledged or assigned,

and any purported pledge or assignment shall be null and void.

(c) This contract shall be subject to administrative orders of the Works Progress Administration which may issue from time to time relating to the administration and operation of regulations heretofore or hereafter issued pursuant to Executive order.

ART. 25. Termination for Breach: In the event any of the provisions of articles 7b, 8b, 11, 18 to 24, and 26 of this contract are violated by the Contractor or any subcontractor on the work, the Contracting Officer may terminate the contract by written notice to the Contractor. In such event, the Government may take over the work and prosecute the same to completion by contract or otherwise, and the Contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby; and the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor.

36 ART. 26. Subcontractors: (a) The Contractor shall cause appropriate provisions to be inserted in all subcontracts relating to this work to insure the fulfillment of all provisions of this contract affecting subcontractors, particularly articles 7b, 11, and 18 to 24.

(b) All bids submitted by contractors should state the wage rates established in the Specification pursuant to the provisions of article 18 hereof.

ART. 27. Accident prevention: The Contractor shall at all times exercise reasonable precautions for the safety of employees on the work and shall comply with all applicable provisions of Federal, State, and municipal safety laws and building and construction codes. All machinery and equipment and other physical hazards shall be guarded in accordance with Manual of Accident Prevention in Construction of the Associated General Contractors of America unless such instructions are incompatible with Federal, State, or municipal laws or regulations. Nothing in this article shall be construed to permit the enforcement of any laws, codes, or regulations herein specified by any except the Contracting Officer.

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ART. 28. Definitions: (a) The term "Head of Department" as used herein, shall mean the Federal Emergency Administrator of Public Works, and "his representative" means any person authorized to act for him.

37 (b) The term "Contracting Officer" as used herein shall mean any person or persons duly authorized by the Fed-

eral Emergency Administrator of Public Works to have general direction of the work under the contract.

ART. 29. Employees' roster.—The Contractor shall maintain an up-to-date roster of all employees engaged on the project, showing their names, legal residences, and source of employment.

ART. 30. Signs.—Signs meeting the requirements of the Contracting Officer and bearing the legend "Public Works Administration—Federal Works Relief Projects No. " (Number to be as assigned for this project) shall be erected by the Contractor in appropriate places at the site of the project.

ART. 31. Alterations.—The following changes were made in this contract before it was signed by the parties hereto:

ART. 1. That part which is enclosed in parenthesis in the first, second, and third lines has been deleted.

See pages 2 (a), 2 (b), 2 (c), and 2 (d), which have been added hereto and made a part of this contract.

38 In witness whereof the parties hereto have executed this Contract as of the day and year first above written.

THE UNITED STATES OF AMERICA.
By (s) HORATIO B. HACKETT.
Assistant Administrator for Federal Emergency Administrator of Public Works.
(Official title)

B-W CONSTRUCTION CO., Not Inc.
Contractor, 307 N. Michigan Ave., Chicago, Illinois.
By (s) JOSEPH H. BEUTTAS
Joseph H. Beuttas
By (s) JOHN W. BEUTTAS
John W. Beuttas
By (s) PAUL H. BEUTTAS
Paul H. Beuttas

Two witnesses:
(s) B. V. INSKEEP.
(s) RUSSELL MANSFIELD.

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39 *General traverse—Filed by leave of Court November 29, 1939.*

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

(Sgd.) FRANCIS M. SHEA.
Assistant Attorney General.

H.F.

Argument and submission of case

October 17, 1945. The argument of the case on the merits began. Argued by Mr. P. J. J. Nicolaides for plaintiff.

October 8, 1943. Argument of case concluded by Mr. P. J. J. Nicolaides for plaintiff. Argued by Mr. D. B. MacGuiness for the defendant, and the case submitted on the merits.

41 Special findings of fact, conclusion of law, and opinion of the Court by Whitaker, J.; Whaley, Chief Justice, concurs.

Concurring opinion by Madden, J.

Opinion, dissenting in part, by Littleton, J.

Mr. P. J. J. Nicolaides for plaintiffs. Mr. William F. Kelley was on the brief.

Mr. Donald B. MacGuineas, with whom was Mr. Assistant Attorney General Francis M. Shea, for defendant.

This case having been heard by the Court of Claims, the court, upon a stipulation entered into between the parties hereto, the evidence, and the report of a commissioner, makes the following:

Special findings of fact

1. The plaintiffs, Joseph H. Beuttas, John W. Beuttas, and Paul H. Beuttas, trading as B-W Construction Company, not incorporated, are citizens of the United States engaged in the building-construction business, and maintain their office in the city of Chicago, Illinois.

2. The plaintiffs entered into a contract with the defendant November 26, 1935, signed by Horatio B. Hackett as Assistant Administrator for Federal Emergency Administrator of Public Works, whereby, for the consideration of $104,896, plaintiffs undertook to furnish all labor and materials and perform all work required for Project No. H-1405, in Chicago, Ill., consisting of the construction of the foundations of the Jane Addams Houses.

42 The work was to be commenced upon receipt by the contractors of notice to proceed and be completed within 75 calendar days after receipt of notice.

3. Article 28 of the contract provided:

"(a) The term 'Head of Department' as used herein shall mean the Federal Emergency Administrator of Public Works, and 'his representative' means any person authorized to act for him.

"(b) The term 'Contracting Officer' as used herein shall mean any person or persons duly authorized by the Federal Emergency

Administrator of Public Works to have general direction of the work under the contract."

4. Article 3 of the contract provided:

"The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (6) specifications of this Contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under the Contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than $500 shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered, unless the Contracting Officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the Contractor from proceeding with the prosecution of the work so changed."

Article 15, thus referred to, provided:

"All labor issues arising under this contract which cannot be satisfactorily adjusted by the Contracting Officer shall be submitted to the Head of the Department. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the Contracting Officer or his duly authorized representative, subject to written appeal by the Contractor within 30 days to the head of the
43 department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the Contractor shall diligently proceed with the work as directed."

5. Paragraph 1 of Section 12 of Division I of the specifications provided that "Subject to the specification, general conditions, and the contract, there shall be paid each Employee in the Trade or Occupation listed below not less than the hourly wage rate set opposite same. * * *"

Carpenters	$1.3125
Cement finishers	1.3125
Hoisting engineers	1.3125
Common laborers	0.825

Paragraph 2 of Section 12, supra, provided that "The above wage rates are subject to review and adjustment by the Federal Emergency Administrator of Public Works, as provided in Article 19 (a) of the contract."

Paragraph 4 of Section 12 also provided as follows:

"The Government will not consider any claims for additional compensation made by the Contractor because of payment by the Contractor of any wage rate in excess of the applicable rate contained herein. All disputes in regard to the payment of wages in excess of those specified herein shall be adjusted by the Contractor."

Articles 18 (a) and 19 (a) of the contract, omitting irrelevant portions, provided as follows:

"(Art. 18) There shall be paid each employee engaged on the project in the trade or occupations listed in the Specifications, the hourly, weekly, or monthly wage prescribed for the same in the Specification. * * *

"(Art. 19) The wage rates established in the Specification shall be subject to change by the Federal Emergency Administrator of Public Works. In the event that the Federal Emergency Administrator of Public Works establishes different wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the Contractor, whether under this contract or any subcontract."

* * * * * *

The specifications were by Article 1 of the contract made a part thereof.

44 6. The work called for by the contract with plaintiffs was confined to the substructures or foundations of the buildings to be erected by defendant.

7. On November 15, 1935, before the contract had been executed by defendant, plaintiffs received a telephone call from a representative of the defendant in Washington, D. C., by the name of Small, to have a steam shovel on the project the following morning. Plaintiffs complied and placed the steam shovel on the project the next morning, after having let a subcontract for the steam shovel, as plaintiffs had planned, for the excavation work. This direction was given to plaintiffs for publicity purposes. The shovel brought on the work by plaintiffs excavated only four or five cubic yards of earth on November 16. It does not appear from the record whether or not the direction given to plaintiffs by Small to have a steam shovel on the project on the morning of the 16th was given by direction of the Director of Housing or the Assistant Administrator of Public Works, as the authorized representative of the head of the department. After plaintiffs had excavated a few cubic yards of material with the steam shovel, as above stated, defendant's project manager at the site told plaintiffs to do no other work.

8. On November 21, 1935, the District Manager of the Housing Division of Public Works Administration at Chicago wrote plain-

tiffs a letter, in reply to their letter of November 19, 1935, with reference to the disposal of excavated material on the project and concluded said letter to plaintiffs with the statement that "With this information at hand, please arrange to proceed with the work under your contract for Foundations for Jane Addams Houses Project H-1405, as outlined in the Plans and Specifications." Plaintiffs proceeded with the work in accordance with this direction of November 21, confining their work at that time to preparatory work, such as organizing personnel, surveying, and subletting contracts for materials and services. There were some structures on the site which plaintiffs' contract required them to remove.

9. On December 9, 1935, A. R. Clas, Director of Housing, directed plaintiffs by telegram to proceed with the work.

45 At noon the next day, December 10, 1935, the contracting officer, due to changes that were being made by him, ordered plaintiffs to suspend all work until further notice. The changes made by the contracting officer consisted of raising the footings of the foundations about two feet and certain other changes which related to the boiler room and coal storage room. The changes in the boiler and coal storage rooms referred to had been decided upon, and revised drawings dated November 20, 1935, with reference thereto had been made and sent to the project manager at the site prior to December 10, 1935, but the work by plaintiffs was suspended and held up by the contracting officer until February 17, 1936, solely for the purpose of consideration by him of the amount by which the contract price should be reduced by reason of the changes shown on said revised drawings of November 20, 1935. This delay of 69 days was unreasonable. There was no provision in the contract which authorized the Government to suspend the work.

On February 12, 1936, the contracting officer advised plaintiffs that—

"* * *, you are instructed to proceed at once with the work under this contract, as modified by the following revised drawings:

"FC-1 to FC-14, inclusive, dated November 20, 1935.

"An equitable adjustment of your contract price and time will be made, as provided in the contract, and a formal Change Order issued modifying your contract accordingly."

Plaintiffs received this order to proceed on February 17, 1936, and in their letter to the contracting officer, acknowledging receipt thereof, they advised him as follows:

"We wish to inform you that, due to this delay beyond our control, we have been subjected to expenses of superintendent, watchmen and paymaster wages, insurance, miscellaneous job costs, government office maintenance, estimating and traveling costs, waiting

time of excavating equipment, and certain expenses of our Chicago office.

"The totals of the above-listed expenses we shall forward to you in due time for your approval."

The contracting officer replied to this February 25, 1936, saying:

46 "As stated in the Proceed Orders issued to you, equitable adjustment of your contract price and time, due to the changes ordered, will be made. Careful consideration will be given to claims presented by you in connection with them."

Due to weather conditions plaintiffs were unable to proceed with the work after receipt February 17, 1936, of the order to proceed, until February 26, 1936, and on February 27, 1936, plaintiffs requested of the contracting officer extension of time "up to February 28, 1936," and repeated their request for additional compensation. Extensions of time were allowed.

Plaintiffs proceeded with the work, as directed, and eventually completed it.

10. Subsequent to the proceed order of February 12, 1936, the contracting officer issued Change Order No. 1 April 17, 1936, under Art. 3 of the contract in which he decreased the contract price in the amount of $9,656.36, based upon the revised drawings of November 20, 1935. Plaintiffs made written protests to the contracting officer in which they renewed their claims for extra costs and expenses as a part of the equitable adjustment to be made under Art. 3 during the period December 10, 1935, to February 17, 1936, when work was suspended because of and in connection with the change under Art. 3. The contracting officer refused to make any adjustments in the change order and on April 22, 1936, advised plaintiffs as follows:

"* * *. Change Order No. 1 is issued without prejudice to your numerous claims which you filed in connection with the authorized revisions. I have previously informed you that although it is my intention to recommend reimbursement for some of these claims, it will be necessary to submit them to the Comptroller General. All of these claims will be presented for his decision at the same time, and as a result it is necessary that you submit itemized substantiation covering those which have been presented in general form only."

Plaintiffs appealed to the head of the department under Art. 15 of the contract.

Subsequently the contracting officer made some other changes for which he issued change orders, from which plaintiffs also
47 timely appealed to the head of the department. However, there was no suspension of the work or delay in connection

with any of the change orders other than Change Order No. 1 of April 17, 1936.

11. The items of the claim made in the petition herein by plaintiffs are as follows:

(1) Maintenance of staff and equipment December 12, 1935, to February 17, 1936; increase of wage rates due to delay for that period; increased cost of removal of earth due to frost penetration	$20,000.00
(2) Failure to include overhead and profit in Change Order No. 1	186.32
(3) Allowance of less than fair and reasonable compensation for removing hidden obstructions	155.28
(4) Increased wages	6,396.00
	26,737.60

The parties herein stipulate and agree by written stipulation signed by counsel for plaintiffs and by the Assistant Attorney General that plaintiffs are entitled to recover the sum of $8,727.44, and only that amount, in connection with all their claims against the defendant presented by this suit, other than their claim based on the wage increases which took place during the course of performance of the contract in question. Defendant consents to entry of a judgment in the amount of $8,727.44 and plaintiffs accept said amount as full compensation for all the said claims, other than that based on the wage increases, item 4 above, amounting to $6,396.

12. On December 28, 1935, plaintiffs received a report from their superintendent on the project based on information obtained by him that the Federal Emergency Administration of Public Works was about to change the scale of wages for carpenters and laborers on P. W. A. projects. At that time the Government had not issued invitation for bids and specifications for the project covering the superstructures of the Jane Addams Houses, the foundations of which were covered by plaintiffs' contract. The Government specifications and invitation for bids for such superstructures were issued February 15, 1936, and set forth the scale of wages, applicable to the superstructures, of certain wage earners, among others, as follows:

	Rates per hour
Carpenters	$1.50
Cement finishers	1.50
Hoisting engineers	1.50
Common laborers	.95

At the commencement of their work plaintiffs began paying the rate of wages set forth in this contract for the foundations (see finding 5) and continued to pay such wages until sometime in February or March of 1936. Defendant did not at any time expressly request plaintiffs to pay higher wages. Plaintiffs' force was unionized and, because plaintiffs were not paying the wage scale pro-

vided in the invitation and specifications for the superstructures, which were not a part of plaintiffs' contract, the Union called a strike and thereby enforced the payment by plaintiffs of the wage scale provided for the project for the superstructures. The Union demanded payment of back wages on the increased scale, retroactive to January 8, 1936, and plaintiffs acceded to the demand.

13. The scale of wages announced in the invitation for bids and specifications for the superstructures was higher than the scale prevailing in the territory at that time on private jobs. The Government did not participate in negotiations between plaintiffs and the striking workmen.

The difference paid by the plaintiffs between the two scales, that on the foundations and that on the superstructures, amounts to $4,321. With added workmen's compensation and social security, the sum of $4,321 is increased to $4,660.83.

14. A dispute arose between the parties to the contract in suit as to reimbursement by defendant to plaintiffs for the additional wages they paid over and above those set forth in the invitation for bids and the contract, the plaintiffs contending that defendant had established higher wages on the project and that they were also entitled to be reimbursed such increase as an added cost due to changes made by defendant in the foundations and consequent suspension and postponement of the work to the time when defendant's higher scale of wages for the superstructures was announced.

The final Change Order No. 1 (first issued by the Director of Housing April 17, 1936), covering the foundations was revised and reissued by the Assistant Administrator on June 25,
49 1936, after plaintiffs' work had been substantially completed, and such change order did not include the wage increases in dispute, but reserved to plaintiffs their right to prosecute their claim, then pending, to such increase. This change order of June 25, 1936, decreased the contract price, as a result of the changes shown on the revised drawings dated November 20, 1935, by $4,721.94, instead of $9,656.36, as first decided by the contracting officer.

15. At the time the contracting officer issued the formal change order of April 17, 1936, as above-mentioned, he advised plaintiffs that he would not allow therein, as a part of the equitable adjustment under Art. 3 of the contract, the actual costs and expenses incurred by plaintiffs in connection with the changes made in the revised drawings, or the increased wages, due to the stoppage and suspension of the work, but that a determination with respect to such items of extra costs and expenses would be made and a recommendation with respect thereto transmitted to the General

Accounting Office for action. Plaintiffs asserted that all their claims for extra costs and expenses were directly attributable to the stoppage and suspension of work in connection with and due to the change and made claim therefor as a part of the equitable adjustment to which they insisted they were entitled under the provisions of Art. 3 of the contract.

On June 29, 1936, the Assistant Administrator of Public Works made written decisions and findings of fact with reference to the various items of the claim asserted by plaintiffs on appeal. His findings and decision with reference to Item 3 of plaintiffs' claim, as a part of the equitable adjustment to which they insisted they were entitled, in the amount of $8,743.42 for extra costs resulting from the stop order and delay due to the change in connection with the revised drawings, were typical of all other findings made by him in connection with such items. In this connection he advised plaintiffs as follows:

"I have reviewed the various claims presented by you involving appeals from decisions made by the Director of Housing as contracting Officer with reference to your contract. * * *.

50 I am listing below the items of your claims, together with my finding with reference thereto: * * *

"Item No. 3

"Contractor's Claim for Damages in the Amount of $8,743.42 Resulting From Delay Caused by Revised Drawing and Stop Order

"This claim includes such items as superintendent's time, watchmen's time, paymasters' time, power shovel waiting time, including watchmen, miscellaneous job expenses and prorated Chicago office expenses. I find that this claim is occasioned by the stopping of work by the Government on December 12, 1935, from which time until February 17, 1936, the job was shut down. I further find that the inability of the contractor to perform any work during this period was occasioned by the direct orders of the Government and was without fault or negligence on the part of the contractor. I further find that as a result of this delay the contractor was occasioned expenses over and above those figured in computing the credits allowed under Change Order No. 1 above referred to and which, but for the stopping of the work by the Government, would not have been occasioned, in the amount of $4,085.58. Attached and marked Exhibit "B" is a detailed statement of such expenses. The matter of the payment of any amount because of additional expenditures involved must be submitted to the General Accounting Office for its ruling as

to whether or not any of the items submitted in your claim for $8,723.42 are properly payable by the Government. Your claim, together with my findings as above noted, will be transmitted to the General Accounting Office at the time the final voucher is submitted for payment, and that office will make final settlement."

16. In the same decision and findings of June 29, 1936, the Assistant Administrator made findings of fact and decisions with reference to the claim of plaintiffs for wage increases above the minimum wage rates set forth in the specifications of their contract, which findings and decision were transmitted to plaintiffs as follows:

"Item No. 6—Wage Increase in the Amount of $6,936 Over and Above Minimum Wage Rate Specified

"I find that the increase in wage rates was occasioned by
51 no fault of the Government, that the Contract placed upon the contractor the obligation of securing workers for the project, and that except as directly authorized by the Government no allowance would be made for increased wage rates. Accordingly, the claim in the amount of $6,936 must, therefore, be disallowed.

"Intem No. 7—Wage Increase in the Amount of $3,467 Over and Above Minimum Wage Rates Specified, Resulting From Delay Due to Revision of Drawing and Stop Order

"This claim arises because of the fact that from the 12th day of December 1935, at which time work was stopped, up to January 8, 1936, the wage rates in effect were lower than those prevailing after January 8, 1936. I find that, had the contractor been permitted to work during the period from December 12 to January 8, he could have obtained workers at the lower rate prevailing up to such date; and because of the delay the work which would otherwise have been performed during the time of the lower pay rate had to be performed after the new wage rate went into effect. I find that because of this delay the contractor was put to an additional expense of $909, which includes 10 percent for overhead and 10 percent for profit. The payment of this item is dependent upon the opinion of the General Accounting Office and will be submitted to it in the same manner as the claims listed under Item No. 3 [i. e., for settlement]."

17. Following the above-mentioned findings and conclusions, the contracting officer proceeded with the matters of final acceptance of the work which had theretofore been completed by plaintiffs, the preparation of the final voucher under the contract, and

the securing of releases from plaintiffs and their surety for the purpose of making final settlement. During this time, and before the final voucher was prepared, plaintiffs on February 12, 1937, in a letter of that date addressed to the Federal Emergency Administrator of Public Works, the head of the department, petitioned him to make a decision on the various items of the claim which had been considered by the Director of Housing and by the Assistant Administrator, as his authorized representative, and to allow such items of the claim as a part of the equitable adjustment under the contract and to include them in the voucher for final payment under the contract.

52 Plaintiffs on March 29, 1937, executed a voucher as the final voucher under the contract for $24,048.25 as the claimed "balance due on contract and changes." To this voucher was attached a release signed by plaintiffs and their surety specifically reserving their rights with respect to seven items in stated amounts totaling $23,548.31, one of which, in the amount of $1,725.20, had been allowed for payment by the Assistant Administrator.

18. On May 20, 1937, Harold L. Ickes, Federal Emergency Administrator of Public Works, after considering plaintiffs' appeal to him, as above-mentioned, made findings of fact, conclusions, and recommendations on the various items of plaintiffs' claim in a letter addressed to the Comptroller General, and accompanied by the final voucher above mentioned. With respect to the claim made by plaintiffs for reimbursement under the contract for increased wages, Mr. Ickes stated in this letter to the Comptroller General as follows:

"Reference is made to the Contractor's claim in the total amount of $10,403 for wage increases over and above the minimum wage rates specified. This claim may be divided into two parts; one for $6,936, resulting, according to the Contractor, from fundamental changes in economic conditions, and the other for $3,467, resulting, according to the Contractor, from the issuance of the specification for superstructure work on this project, which specification established wage rates different from those set up in the foundation specification and different from those applicable at the time of issuance of the aforementioned stop order. I find, after checking the certified pay rolls in connection with the entire project from its inception on December 12, 1935, up to and including its completion of final pay roll on May 19, 1936, that the B-W Construction Company did actually pay a total of $4,259.12 in excess of the minimum rates specified to the laborers and mechanics employed directly at the project site. I find also that the N. Cullen Company, a Subcontractor, actually paid $61.88

in excess of the minimum rates specified. By totaling the increase in wages over and above the minimum rates specified, as indicated above, it is noted that the Contractor and the Subcontractor did pay $4,321 more than the minimum wages required by the contract. The Contractor in arriving at his total of $10,403 used a percentage basis rather than the actual excess wages paid over those specified.

I find that there were no fundamental changes in economic
53 conditions as contemplated by Article 19 (a), as amended, of the contract, and I recommend that the claim for $6,936 be disallowed. As to the Contractor's claim for $3,467, you are informed that the labor rates specified in the contract are minimum rates only. I understand that the minimum rates specified are in accordance with those set forth in an agreement entered into between the Building Trade Employers' Association and the Unions of the City of Chicago. I do not have at my disposal a copy of this agreement, which I understand established the rate contractors were to pay as wages up to and including January 1, 1936. I understand that the Contractor is a member of this Association and had in his possession a copy of the agreement with the Unions prior to the time of his bidding. The Government had no way of knowing what minimum rates would be established after January 1, 1936, as the Unions and the Building Trade Employers' Association had not established the rates for the year 1936 at the time the foundation work was bid upon. Consequently, the Contractor should have been guided by the Unions' agreement, and it is my opinion that it was his obligation to provide, in his bid, against any possible increase in wages over and above the minimum specified, due to the fact that the Government did not specify the maximum rate. Moreover, Division I, page 6, paragraph 4, Section 13 [12] of the Specification, states:

"The Government will not consider any claims for additional compensation made by the Contractor because of payment by the Contractor of any wage rate in excess of the applicable rate contained herein. All disputes in regard to the payment of wages in excess of those specified herein shall be adjusted by the Contractor."

"I am of the opinion that this claim should be disallowed in its entirety, as I find that the acts of the Government, in advertising for the superstructure contract and in establishing rates for that contract on February 15, 1936, did not increase the wage rates that the Contractor was obligated to pay, and that wages were increased because of the expiration on January 1, 1936, of the agreement with the Unions, and the signing of a new agreement. Furthermore, I am of the opinion that the Contractors in the City of Chicago were advised by the Unions that on January 1,

1936, the wages in the old agreement would be cancelled and higher wages would be established after January 1, 1936.

54 "I find that the issuance on December 12, 1935, of the aforementioned stop order, prevented the Contractor from proceeding with the work until a proceed order was issued on February 17, 1936. The expenses incurred by the Contractor, due to this act of the Government prohibiting him from starting with his work on December 12, which would have allowed him to pay the prevailing rates for wages as of that date, namely, 82½¢ per hour for laborers and $1.31¼ for carpenters, up to and including January 8, 1936, which is the date upon which the Contractor started to pay a higher rate, namely 95¢ per hour for laborers and $1.50 per hour for carpenters, is a fair and just charge against the Government. Therefore, I recommend that the Contractor be reimbursed for the increase of wages he paid to laborers at the rate of 12½¢ per hour and the increase of wages he paid carpenters at the rate of 18¾¢ per hour for the total hours of laborers employed and the total hours of carpenters employed in the 26 days following the date of Proceed Order, namely, February 17, 1936. The manner in which I arrive at this 26 days is by using the Stop Order date of December 12, up to and including January 8, which is the date the higher wages went into effect, as the amount of days, the Contractor would have been able to employ men at the lower wages. The total number of labor hours in the first 26 days after February 17 (which in reality was February 24 due to the fact the Contractor could not proceed on account of weather conditions) indicated on the Contractor's and his Subcontractor's certified pay rolls as having been paid on the increased wage basis, namely, 95¢ per hour, is 983½ hours, and when extended at the rate of 12½¢ per hour equals $122.94. The total number of carpenters' hours in the first 26 days after February 17, 1936 (which in reality begins on March 16, 1936, due to the fact that the carpenters were on strike), as indicated in the certified pay rolls, is 3,351 hours, and when extended at the rate of 18¾¢ per hour is $628.31, making a total increase for laborers and carpenters of $751.25 and I recommend that the Contractor be paid 10 percent overhead and 10 percent profit, which is in accordance with the specifications when an extra is involved, which makes a total of $909.00, and my finding is that this amount is chargeable to the cost of arriving at the settlement between the original contract plans and the revised plans and is an item of damages against the Government. * * *

"There is enclosed a voucher in the amount of $24,048.25, which amount includes all of the Contractor's claims
55 enumerated and commented on herein. Also enclosed are

the Certificate of Completion and the Certificate and Release relating to this contract.

"The Contractor has refused to execute separate vouchers, one for the final payment under the contract as adjusted, in the amount of $2,225.06 and one for the amount of his claims, namely, $21,823.19. Therefore, of the total amount of the voucher enclosed I hereby certify that $2,225.06 is due the Contractor as final payment under the contract as adjusted.

"The balance of the enclosed voucher in the amount of $21,823.19 is referred to you for direct settlement without my certification, but it is my recommendation that, in addition to the amount I have certified as being due under the contract, the Contractor be reimbursed for the individual items recommended in settlement of this claim."

19. The statement made in the above-quoted letter that the labor rates of wages provided for by the agreement between the Building Trade Employers' Association and the Unions of the City of Chicago terminated January 1, 1936, and that thereafter higher rates were to be established, was an error. The agreement between the Building Trade Employers' Association and the Unions fixing rates of wages did not expire until May 31, 1936.

20. The Comptroller General upon receipt of the final voucher executed by plaintiffs and the letter and recommendations of Administrator Harold L. Ickes refused to authorize payment under the contract of any of the controverted items of plaintiffs' claim, but approved the voucher for the amount of $2,225.06 as the amount otherwise due under the contract, as certified by the head of the department, and issued a certificate of settlement accordingly on February 7, 1938.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiffs are entitled to recover $13,388.27.

It is therefore adjudged and ordered that plaintiffs recover of and from the United States the sum of thirteen thousand three hundred eighty-eight dollars and twenty-seven cents ($13,388.27).

56

Opinion

WHITAKER, Judge, delivered the opinion of the court:

Plaintiffs sue to recover extra costs incurred due to a suspension of the work for 69 days during which a change in the plans and specifications was being considered. It is stipulated that they are entitled to recover $8,727.44 on this account.

They also sue to recover for increased wages which they were required to pay common laborers, carpenters, cement finishers, and hoisting engineers.

Plaintiffs had a contract for the construction of the foundations of the Jane Addams Houses in Chicago. It was a relief project; it was intended to relieve unemployment, to provide a living wage for laborers and so to increase their purchasing power. What a living wage was, was fixed by the contract. The contractor was required to pay a minimum wage for common laborers of 82½ cents an hour, and for carpenters, cement finishers, and hoisting engineers of $1.31¼ an hour. It was recognized, however, that the cost of living might increase during the progress of the work or for some other reason that the Government might find it desirable that even higher wages should be paid, and so it was provided in article 19 of the specifications that if the Federal Emergency Administrator of Public Works "establishes different wage rates, the contract price shall be adjusted accordingly. * * *"

The contract was entered into on November 26, 1935, but defendant held up the work until February 17, 1936, when it gave plaintiffs notice to start work; however, work was not begun until February 28, 1936, due to bad weather. While the work was under suspension the defendant on February 15, 1936, asked for bids on the construction of the building above the foundation. (Plaintiffs' contract was for the foundation only.) This advertisement for bids required bidders to pay a minimum wage to the before-mentioned laborers higher than was provided for in plaintiffs' contract. A successful bidder on this part of the building could not pay common laborers less than 95 cents an hour, instead of the 82½ cents on the foundation contract, and could not pay carpenters, cement finishers, and hoisting engineers less than $1.50 per hour, instead of the minimum of $1.31¼ on the foundation contract.

Whereas on November 26, 1935, the Government thought not less than $1.31¼ was a fair wage for carpenters, cement finishers, and hoisting engineers, and 82½ cents for common laborers, by February 15, 1936, conditions had changed to such an extent that it no longer considered these fair wages and demanded of the superstructure contractor the payment of higher wages.

Plaintiffs' work did not commence until after this change in the wage rate. So, when they offered to pay their carpenters, cement finishers, and hoisting engineers $1.31¼ and common laborers 82½ cents, these men very naturally said, no, the Government has said that no less than $1.50 and 95 cents is fair; and

when plaintiff would pay no more, they struck. In order to induce them to work plaintiffs had to pay the $1.50 and 95 cents.

All the proof goes to show the laborers would not have struck except for the Government's action in establishing a higher minimum wage on the very same building on which plaintiff's laborers were employed.

That they should have struck was well-nigh inevitable. They had no contract with plaintiffs to work at any fixed wage and so, when their Government said that the least that ought to be paid for such labor was more than the plaintiffs offered, of course they demanded the amount fixed by the Government as fair and refused to work for less.

So, while the defendant did not expressly demand of these plaintiffs that they pay a higher minimum wage on their contract, it nevertheless brought about conditions that made this almost inevitable, and it must have known that this would be the necessary consequence of its act. Just as effectively as though it had directly ordered plaintiffs to pay a higher wage, it indirectly required them to do so.

In LeVeque, et al. v. United States, 96 C. Cls. 250, we held that the establishment by the Government of higher wages on another project in another part of the city did not require it to pay plaintiffs the increased wages they had to pay on their project. In that case we concluded the increase in wages paid by plain-
58 tiffs was not a necessary result of defendant's act. Here we think it was. The increased wages in this case were on the very same building on which plaintiffs were working. The Administrator did not directly establish different minimum rates to be paid by plaintiffs, but this was the necessary consequence of what he did. He did indirectly that which if done directly would have rendered the Government liable. We are of opinion that the defendant in fact established different wage rates on plaintiffs' job, and, therefore, it is obligated to pay the increase under article 19.

But whether or not this is so, it is an implied condition of every contract that neither party will hinder the other in his discharge of the obligations imposed upon him, nor increase his cost of performance. Restatement of the Law of Contracts, sec. 315 (1); Williston on Contracts, sec. 1293 A; Anvil Mining Co. v. Humble, 153 U. S. 540, 551. It was an implied condition of this contract that the Government would not do any act that as a necessary consequence would make performance by the plaintiffs more expensive. The Government breached that implied condition by increasing the minimum wage to be paid on a part of this build-

ing, which as a necessary consequence required plaintiffs to pay more wages than those specified.

It follows that the defendant is liable for the increased wages plaintiffs had to pay.

It is said, however, that the contracting officer and head of the department have decided that the Government has fully performed its obligations under the contract, and that this decision is final under article 15 of the contract and that, therefore, this court has no jurisdiction to determine the matter.

The defendant's position, otherwise stated, is that the parties agreed in advance of the dispute to waive their right to sue for this breach of the contract and to leave the final determination of the controversy to the decision of one of the contracting parties.

We do not think the parties intended article 15 to have such broad scope. If they did, it is clearly illegal under numerous decisions of the Supreme Court of the United States and of other Federal courts and of the State courts. It has long
59 been settled that any agreement made in advance of the controversy which deprives a party of recourse to the courts is contrary to public policy and, therefore, void. Insurance Co. v. Morse, 20 Wall. 445, 450, et seq.; Doyle v. Continental Ins. Co., 94 U. S. 535, 537; Guaranty Trust Co. v. Green Cove R. R., 139 U. S. 137, 142; Martin v. B. & O. R. R., 151 U. S. 673, 684; Terral v. Burke Construction Co., 257 U. S. 529. See also cases cited in 13 Corpus Juris, p. 455, notes 3, 5 and 8; 17 Corpus Juris Secundum p. 603, notes 58, 66.

In Insurance Co. v. Morse, supra, there was involved a statute of Wisconsin which imposed on foreign insurance companies, as a condition to doing business in the State, an agreement to submit to the exclusive jurisdiction of the Wisconsin courts and to forego removal of a case to the Federal courts. It was held that the statute was unconstitutional and void, because "a man may not barter away his life or his freedom, or his substantial rights."

The statement of this principle was somewhat amplified in Doyle v. Continental Ins. Co., supra, in commenting on the Morse decision. It was there said, on page 538:

"It was held, first, upon the general principles of law, that although an individual may lawfully omit to exercise his right to transfer a particular case from the State courts to the Federal courts, and may do this as often as he thinks fit in each recurring case, he cannot bind himself in advance by an agreement which may be specifically enforced thus to forfeit his rights. This was upon the principle that every man is entitled to resort to all the courts of the country, to invoke the protection which all the laws

and all the courts may afford him, and that he cannot barter away his life, his freedom, or his constitutional rights."

The majority of the court, however, held that while a State could not impose this condition on an insurance company's entering into business, it nevertheless had the right to revoke its license, even though a breach of the condition may have been the reason for the revocation. Justices Bradley, Swayne, and Miller dissented on the ground that the same reason that prevented the imposition of such a condition prevented the revocation of the license for its breach. Both the majority and minority
60 agreed, however, that a condition in a contract prohibiting resort to a tribunal otherwise having jurisdiction of the subject matter and the parties was illegal.

Fifty years later this view was approved by the Supreme Court in the case of Terral v. Burke Construction Co., 257 U. S. 529, and we understand it to be the law today. Section 558 of Restatement of the Law of Contracts reads:

"A bargain to forego a privilege that otherwise would exist to litigate in a Federal Court rather than in a State Court, or in a State Court rather than a Federal Court, or otherwise to limit unreasonably the tribunal to which resort may be had for the enforcement of a possible future right of action or the time within which a possible future claim may be asserted, is illegal."

It is true that it is not uncommon in construction contracts for the parties to agree that the decision of the architect or engineer shall be final on such questions as the proper interpretation of the plans and specifications, whether or not the work of materials comply with the specifications, the measurement of the work done, causes and extent of delay, and similar matters of fact (e. g., see Kihlberg v. United States, 97 U. S. 398; Sweeney v. United States, 109 U. S. 618; Martinsburg & Potomac R. R. Co. v. March, 114 U. S. 549; United States v. Gleason, 175 U. S. 588; Ripley v. United States, 223 U. S. 695; Plumley v. United States, 226 U. S. 545; United States v. Mason & Hanger Co., 260 U. S. 323); but provisions leaving to the final judgment of the engineer or architect the question of whether or not there has been a breach of the contract and preventing resort to the courts for a determination of that question and for enforcement of rights thereby accruing have never been upheld. For instance, in Guaranty Trust Co. v. Green Cove R. R., supra, a provision of a trust deed agreeing not to resort to the courts for its enforcement was held invalid on the authority of a number of English and State cases there cited.

Even arbitration agreements not authorized by statute, leaving to arbitrators the final determination of whether or not there has been a breach of the contract, are illegal, but parties may legally agree on arbitration to determine facts upon which a duty

61 depends. See Restatement of the Law of Contracts, secs. 550 and 551; Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109, 120–121.

Here the agreement, as construed by the defendant, is to leave the settlement of the dispute not to arbitrators but to an agent of one of the parties. It is an agreement to leave to the party who made the contract the determination of whether or not it had breached it.

If Article 15 is to be given such a broad scope, then an aggrieved contractor is denied access to this court save only in those cases where the decision of the contracting officer on whether or not he has breached his contract is arbitrary or capricious or so grossly erroneous as to imply bad faith. Such an agreement would be contrary to the Act of Congress giving its consent that the United States might be sued. On February 24, 1855, Congress passed an Act creating the Court of Claims and said, "*the said court* shall hear and determine all claims founded upon * * * any contract, express or implied, with the Government of the United States, * * *". [Italics supplied.] This provision is the law today. Section 145 of the Judicial Code; sec. 250, Title 28, U. S. C. It was the law when this contract was entered into. Can it be said that it was in the power of any officer or agent of the Government to set aside this Act of Congress and to say that the contracting officer, and not the Court of Claims, "shall hear and determine all claims founded upon [this] contract"? Such a provision is contrary to the law established by Congress and, therefore, is void.

Not only is it beyond the power of a party to bargain away this right given by Congress, but it must be borne in mind that bidders on this work were forced to enter into this sort of an agreement. The Government contends that as to this project this governmental agency said, the right given by Congress to sue in the Court of Claims is hereby taken away; an agrieved contractor can secure redress only by appealing to the contracting officer; he will decide whether or not we have paid you all we promised to pay.

This would be a shocking demand; Barlow et al. v. United States, 35 C. Cls. 514, 546; we do not believe the government intended to make it. We are of opinion that they intended to demand only that the contracting officer should decide
62 questions of fact arising as the work progressed, such as the proper interpretation of the requirements of the contract documents, the fitness of the materials, and the sufficiency and amount of the work, etc. Article 15, providing for decisions by the contracting officer, concludes, "In the meantime the contractor shall diligently proceed with the work as directed." This

clearly indicates they had in mind only those disputes that arose during the progress of the work. It negatives the idea that after the contractor had done all the work required of him, the contracting officer should decide whether or not he had been paid all he was entitled to.

We are of opinion the defendant is liable for increased wages paid by the plaintiffs in the amount of $4,660.83. On the whole case plaintiffs are entitled to recover the sum of $13,388.27. Judgment for this amount will be entered. It is so ordered.

WHALEY, *Chief Justice*, concurs.

Concurring opinion

MADDEN, *Judge*, concurring:

In my opinion, the case should be decided upon the ground that, whether or not the express provision of Article 19 was applicable, the Government, like any other contractor, impliedly agrees that it will not by its acts increase the cost of performance of the contract by the other party. We need not consider the effect of acts of the Government in its sovereign capacity, such as increasing taxes or setting wages or hours by laws of general application. Here the act complained of was the setting of wages on one specific job, which was the superstructure to be built on the foundation which the plaintiff had contracted to build.

The Government breached this term, which we read into the contract because it is fair and the parties to the contract must have intended it. Yet the Government urges that Article 15 of the contract gave the Contracting Officer the power to read this term out of the contract by deciding that the plaintiff was not entitled to a remedy for its breach. I think there are two objections to this argument.

(1) There is no indication that the Contracting Officer ever made a decision or gave any consideration to such a term
63 of the contract, or was aware that it contained any such term. This fact points to one of the difficulties that would be created by lodging in a contracting officer, nearly always a layman, the power to decide a question which cannot be decided without an understanding of the way in which the law has traditionally interpreted the texts of writings which appear in litigation. The consequence would be an interpretation which would stick in the letter of the contract and fail to reach its real meaning and equity. I think, therefore, that the Contracting Officer never decided the question which we are called upon to decide.

(2) I think that the parties never intended that the Contracting Officer should have the power to decide the question which we have before us, i. e., the question of whether or not the Government

breached its contract. In spite of the broad language of Article 15 of the contract, it must be that there are limits to its scope. In fact, the evidence in cases before us shows frequent examples of situations in which the Contracting Officer has disclaimed any power to decide that the contractor is entitled to compensation for unreasonable delay caused by acts of the Government. He knows that his decision would be substantially meaningless, since he could not award compensation, except by the expedient of covering it into some change or adjustment which he is authorized to make as the contracting agent for the Government. So he advises the contractor to seek relief from the Comptroller General first and, if he does not get it there, from this court. The Comptroller General, whose powers are somewhat undefined and whose expenditures are, so far as the Government is concerned, practically unreviewable, sometimes gives relief. If he does not, the contractor may come to this court, and the Government may not urge that his case is concluded by a decision made somewhere else, since the Contracting Officer made no decision at all, and the Comptroller General's decision does not, either by the contract or by law, foreclose resort to this court.

Since the Contracting Officer cannot make a decision, effective against the Government, that the Government has breached its contract, and since, if he did so, we would not be bound by it, he frequently does not decide the question at all if his decision
64 would be against the Government. This means that, in practice, the contractor, if he meant, by agreeing to Article 15, to lodge in the Contracting Officer the power to decide questions of breach of contract, has given that official power to decide cases against him, but no power to decide cases, effectively, in his favor. No contractor in his right mind would ever intend to do that. And no Government official, in drawing a contract, would intend to include in it such an unconscionable provision. And if both of them did, with their eyes open, intend any such agreement, we would feel bound to conclude that the law permitting Government agents to make contracts, and the statutes giving to a victim of the Government's breach of contract the right to sue in this court, do not authorize an agent of the Government to defeat that right by making such an unconscionable bargain about it. I therefore agree with the court that Article 15 was not intended to give to the Contracting Officer the power of decision which the Government claims for him, and that we are not foreclosed from deciding the case.

I recognize that, under Article 15 and other provisions of the standard Government contract, many matters of vital consequence to the contractor may be decided by the Contracting Officer without effective review by this court. The consequences are some-

times, in our opinion, harsh and unjust to the contractor. And the line between what the Supreme Court and this court have sanctioned in those cases, and what we refuse to sanction here may not always be easy to draw. But what the Government here urges, the power in the Contracting Officer to decide the ultimate question of whether his principal has breached its contract, should not be tolerated.

Opinion

LITTLETON, Judge, dissenting in part: I dissent as to the allowance of any part of the sum of $4,660.83 (finding 13) on account of increased wages.

In support of their claim for the recovery of these increased wages plaintiffs insist that section 12, Division 1, of the specifications and article 18 (a) of their contract (finding 5) fixed the wages that they were to pay under the contract and that, by article 19 (a), the Government agreed to reimburse them by adjustment of the contract price in the event the Administrator of Public Works established different wage rates. They further insist
65 that the Administrator did establish higher wage rates within the meaning of the provisions of the contract and specifications mentioned. I cannot agree. The wages specified in plaintiff's contract were minimum rates only. Article 19 (a) of the contract and paragraph 4 of section 12 of the specifications contemplated, I think, that the Government would increase plaintiff's contract price only in the event the Administrator established greater minimum wage rates under this contract and directed them to pay wages at such increased rates. The "project," referred to in art. 19 (a), was the foundation work and not the buildings which the Government might, under another contract, erect thereon. Each P. W. A. contract made was given a project number, and plaintiff's contract was "Project No. H-1405." The Administrator did not establish greater minimum wage rates under plaintiffs' contract nor on the "project" covered thereby, nor did he direct or otherwise directly force them to pay any increased wages. He did nothing except what he had a perfect legal right to do so far as plaintiffs' contract was concerned. Perhaps he should not have advertised for another contract at higher minimum wages, which would result in a higher bid price to the Government, until plaintiffs had finished their contract which was closely related to the new work, but this was not a breach of any express or necessarily implied provision of their contract and cannot be made the basis of a claim for reimbursement under art. 19 (a). Dravo Corporation v. United States, 93 C. Cls. 734. Moreover, section 12 of the specifications provided that the Government would not consider any claims for additional compensation because of payment by the

contractor of any wage rate in excess of the applicable rate contained therein, and that all disputes with labor in regard to payment of wages in excess of those specified "shall be adjusted by the contractor." This provision appears to have contemplated an event such as actually happened, i. e., a strike for higher wages.

The minimum wage rates set forth in plaintiff's contract were fixed by the Administrator of Public Works in the invitation for bids and specifications for the particular project covered by that contract under the Rules and Regulations approved by the
66 President December 26, 1934, issued under authority of section 203, Title II of the National Industrial Recovery Act, and Executive Order No. 6929, which Regulations, as far as material here, were as follows:

"Whereas, the President, by Executive Order No. 6829, of December 26, 1934, has delegated to the Federal Emergency Administrator of Public Works the power * * * to prescribe new rules and regulations * * * I hereby prescribe the following rules and regulations under the authority of the said section 209 as necessary to carry out the purposes of said Act, which rules and regulations shall apply to all projects constructed in whole or in part under Title II of said Act: * * *

"3. Wages: The wages paid to employees directly employed on any such project shall not be less than the applicable minimum wage rates which the Administrator may fix from time to time. Should it appear that any individual employed on any such project has been or is being paid less than the minimum wage fixed by the Administrator and in force at the time such labor was performed, the employer of such individual shall be notified to pay him all wages due according to the prescribed rate. Upon ten days' default on the part of any such employer after the receipt of such notice he shall be subject to the penalties provided in said Act for violation of these regulations."

The actual increased wages of $4,321, which plaintiffs incurred, were incurred and paid as a direct result of a demand and strike of their Union employees. Except for this, plaintiffs would not have been required by the Administrator, or otherwise, to pay any increased wages. Defendant did not request plaintiffs to increase the wages rates and no one representing the Government or the Administrator participated in the dispute between plaintiffs and the labor unions. The fact that the labor unions of the Chicago territory may have failed to abide by their wage agreement with the Building Trade Employers' Association, of which plaintiffs were members, cannot be made the basis of a claim for reimbursement against the Government. Nor can the Government be held liable to plaintiffs for reimbursement of the increased wages which they were compelled to pay under the circumstances, because the

Government on February 15, 1936, issued invitations for bids and specifications for another contract on another and a different project for the building to be constructed on the foundations
67 covered by plaintiff's contract in which minimum wage rates higher than those contained in plaintiffs' contract were specified. The provisions of plaintiffs' contract did not expressly cover such a situation, and the language used in art. 19 (a) and pargraph 12 of the specifications cannot be so extended as to include it by implication. Leslie L. LeVeque et al. v. United States, 96 C. Cls. 250. Hood & Gross 1. United States, 90 C. Cls. 258, 265. James I Barnes 1. United States, 92 C. Cls. 32, 43, 44. Cf. Blair v. United States,— U. S. —, April 10, 1944.

Art. 15 of the contract made the decisions of the contracting officer and the head of the department final on such questions. They both considered and rendered adverse decisions on the question whether the Administrator had established different wage rates in such a way as to require reimbursement to plaintiffs for the increased wages which they paid. This was clearly a "dispute concerning questions arising under this contract" and their decisions were final under the express agreement of the parties. These decisions were clearly not arbitrary, and they were clearly not so grossly erroneous as to imply bad faith. We cannot, therefore, ignore them. Ripley v. United States, 220 U. S. 491; 222 U. S. 144, 147; 223 U. S. 695, 696, 701, 702. Burchell v. Marsh, 14 How. 344, 349, 350.

Defendant makes the contention that plaintiffs did not appeal from the decision of the contracting officer to the head of the department. This contention appears to be based on the assumption that the Assistant Administrator was the contracting officer. Plaintiffs did appeal, and within time. Under the contract provisions the Director of Housing, A. R. Clas, was the contracting officer, as the Assistant Administrator stated in his decision of June 29, 1926. The Assistant Administrator of Public Works, Horatio B. Hackett, although he signed the contract, was the head of the department within the meaning of the contract as defined by article 28 (a). He was duly authorized to act for the Administrator and he did so act with reference to approval of change orders and consideration and decisions of appeals.

Plaintiffs make the alternative claim that even if their claim for reimbursement of the increased wages, as such, should be denied they should have judgment for at least $909 on account of
68 such wages (they claim the amount should be $1,856.08) under the findings and recommendations of the Assistant Administrator in his letters of June 29 and August 12, 1936, to plaintiffs and in the letter of the Administrator of May 20, 1937, to the Comptroller General (finding 18). These officials decided

in connection with plaintiffs' claim for extra costs that the expenses necessarily incurred by plaintiffs, including a portion of the increased wages, as a result of the stoppage and suspension of their work from December 10, 1936, to February 17, 1937, in connection with changes could not be allowed by them as an increase in the contract price as a part of an equitable adjustment under art. 3 of the contract in connection with the change order. This position appears to have been taken because of certain rulings of the Comptroller General. (See 7 Comp. Gen. 645; 12 Comp. Gen. 179, 227.) They therefore made findings with reference to the amounts and the cause of these expenses, and recommended to the Comptroller General that certain amounts be paid. While these findings and recommendations should be given great weight if the items covered thereby are found by the Court to be allowable, either under the contract or as damages for a breach thereof, they are not such decisions as are made final and conclusive by art. 15 for such purposes. The evidence of record does not warrant a finding by the Court that of the total increased wages paid by plaintiffs the amount of $1,556.06, or $909 thereof, was incurred as a result of the delay due to suspension of the work for 69 days in connection with the change under the contract as mentioned in the findings.

I think judgment should be entered in favor of plaintiffs for only $8,727.44.

JONES, Judge, took no part in the decision of this case.

69 *Judgment*

At a Court of Claims held in the City of Washington on the 5th day of June, A. D., 1944, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiffs are entitled to recover $13,388.27.

It is therefore adjudged and ordered that plaintiffs recover of and from the United States the sum of thirteen thousand three hundred eighty-eight dollars and twenty-seven cents ($13,388.27).

70 [Clerk's Certificate to foregoing transcript omitted in printing.]

[Endorsement on cover.] Enter the Solicitor General. File No. 48884. Court of Claims. Term No. 431. The United States, petitioner, vs. Joseph H. Beuttas, John W. Beuttas, and Paul H. Beuttas, Trading as B-W Construction Co., not Inc. Petition for writ of certiorari and exhibit thereto. Filed September 5, 1944. Term No. 431 O. T. 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

Supreme Court of the United States

Order allowing certiorari

Filed November 20, 1944

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

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CHARLES ELMORE CROPLEY
CLERK

No. 431

In the Supreme Court of the United States

OCTOBER TERM, 1944

THE UNITED STATES, PETITIONER

v.

JOSEPH H. BEUTTAS, JOHN W. BEUTTAS, AND PAUL H. BEUTTAS, TRADING AS B–W CONSTRUCTION CO., NOT INC.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 431

THE UNITED STATES, PETITIONER

v.

JOSEPH H. BEUTTAS, JOHN W. BEUTTAS, AND PAUL H. BEUTTAS, TRADING AS B–W CONSTRUCTION CO., NOT INC.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered in the above-entitled case on June 5, 1944.

OPINIONS BELOW

The opinions of the Court of Claims (R. 34–45) are not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered June 5, 1944 (R. 45). The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended.

QUESTIONS PRESENTED

1. Whether Article 15 of a standard form Government contract, which provides that the decision of the head of the department on "all disputes concerning questions arising" under the contract shall be final and conclusive upon the parties, applies to a finding by the head of the department that the contractor's payment of higher wages than those specified in the contract were not caused by acts of the Government.

2. Whether, if Article 15 of the contract was intended to apply, it could validly be agreed to by the parties.

3. Whether the Government, in inviting bids for superstructures to be erected under separate and later contracts, specifying minimum wages which were higher than those fixed in respondents' contract for the foundations, thereby violated an implied obligation in respondents' contract.

CONTRACT PROVISIONS INVOLVED

The contract provisions involved are set forth in the Appendix, *infra*, pp. 18–22.

STATEMENT

Respondents, who are engaged in the building construction business in Chicago, entered into a contract with the United States on November 26, 1935, to construct the foundations of the Jane Addams Houses, a Public Works Administration

project in Chicago (Fdgs. 1, 2). The work was duly completed some time in June 1936 (Fdg. 14).[1]

The contract provided (Art. 18) that employees engaged on the project should receive the minimum wages listed in the specifications, and that the "Government will not consider any claims for additional compensation made by the Contractor because of payment * * * of any wage rate in excess of the applicable rate" specified therein (Spec., Div. I, sec. 12, pars. 1 and 4). The contract also provided (Art. 19) that the listed wage rates were subject to change by the Federal Emergency Administrator of Public Works, in which event the contract price was to be "adjusted accordingly on the basis of all actual labor costs on the project to the Contractor" (Fdg. 5).

On February 15, 1935, the Government issued an invitation for bids for the superstructures of the buildings for which respondents were constructing the foundations. That invitation specified minimum wage rates which were higher than those being paid to respondents' employees, who were unionized. The Government did not request that respondents pay the higher rate of wages, but in February or March 1936 the Union

[1] The work was to be completed within 75 calendar days after receipt of notice to proceed (i. e., by February 23, 1936), but completion was delayed by various change orders and other causes for which extensions of time were granted by the United States (Fdgs. 2, 9).

of respondents' employees called a strike to compel respondents to pay wages equal to those specified for the superstructures, and respondents acceded to the Union's demand for payment of the higher wage rates retroactively to January 8, 1936. (Fdg. 12.) The Government did not participate in the negotiations between respondents and the strikers (Fdg. 13).

Respondents claimed reimbursement for the increase in wages, and a dispute arose as to the right thereto (Fdg. 14). This dispute, together with other items of claim, was duly submitted to the contracting officer, who rejected the wage claim (Fdg. 15).[2] Respondents thereupon appealed to the Assistant Administrator of Public Works who rendered a written decision with findings of fact on June 29, 1936, wherein he found that "the increase in wage rates was occasioned by no fault of the Government," and rejected the claim (Fdg. 16). Respondents then petitioned

[2] The other items of claim consisted of damages alleged to have resulted from the delay caused by the Government. These claims were duly presented to the contracting officer and the head of the department, who found that the respondents were entitled to $8,727.44 therefor. Petitioners and respondent stipulated below that respondents were entitled to recover that amount for all claims other than those resulting from wage increases, and that judgment might be entered for that amount. (Fdg. 11.) Consequently, those parts of the findings below relating to delay and the damages occasioned thereby (especially Fdgs. 7, 8, 9, 10, and 11) are not material to this petition.

the Federal Emergency Administrator of Public Works to decide the claim, and on May 20, 1937, in a letter to the Comptroller General, the Administrator made findings of fact, conclusions and recommendations disallowing the wage item. He found that the increased wages were caused by the new wage agreement signed by respondents with the Union after the contract with the Government was entered into, and not by the acts of the Government in advertising for the construction of the superstructure at increased wage rates. (Fdg. 18.) The Comptroller General thereupon refused to authorize payment of the controverted item (Fdg. 20), and respondents brought suit in the Court of Claims. That court entered judgment for respondents.[1]

The three judges in the majority[2] held that the specification by the Government of higher minimum wages for the superstructures required respondents, "as a necessary consequence," to pay higher wages on their job, and was a breach of the implied obligation of the United States to refrain from any action which would make respond-

[1] The judgment in the amount of $13,388.27 consists of $4,660.83 as the excess wages paid, and $8,727.44 as the stipulated recovery on account of the changes and delays (see n. 2, p. 4, *supra*).

[2] Judge Whitaker delivered "the opinion of the court," in which Chief Justice Whaley alone concurred; Judge Madden wrote a separate concurring opinion; and Judge Littleton wrote a dissenting opinion. Judge Jones did not participate in the decision.

ents' performance more expensive.[5] The majority further held that Article 15 of the contract was not intended to authorize Government officials to decide questions of breach of contract; but if it were so intended, it was illegal.[6]

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

(1) In holding that by inviting bids for the superstructure at minimum wage rates higher than those set forth in respondents' contract the United States violated an implied obligation of that contract.

(2) In rejecting administrative findings of fact that the increased wages paid by respondents were not caused by such an invitation for bids, without finding that such administrative findings were arbitrary, capricious or so grossly erroneous as to imply bad faith.

(3) In holding that such findings related solely to a question of law.

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[5] The opinion of Judge Whitaker and Chief Justice Whaley also held that the United States, by fixing a higher wage for the superstructures on the same buildings, had "indirectly" established a higher minimum wage under respondents' contract and was therefore obligated to pay the increase under Article 19 of the contract.

[6] Judge Whitaker and Chief Justice Whaley placed this conclusion on the ground that such a stipulation constituted an attempt in advance of a controversy to deprive a party of recourse to the courts; and that it unconscionably circumscribed the jurisdiction conferred upon the Court of Claims by Section 145 of the Judicial Code (28 U. S. C. 250) to hear and determine claims founded upon Government contracts.

(4) In holding that Article 15 of the contract was not intended to make the decision of the head of the department final and conclusive on "disputes" concerning questions arising under" the contract if such questions are of law or involve a possible breach of contract by the Government.

(5) In holding that a contrary construction of Article 15 would make that provision illegal.

(6) In holding that it was beyond the competence of the parties to confer authority upon the head of the department to make conclusive rulings on questions of law, and in particular on questions involving a breach of contract.

(7) In entering judgment for respondents for the increased wages paid by them.

REASONS FOR GRANTING THE WRIT

The form of Government contract here involved is "U. S. Government Form P. W. A. 51" and is identical with those considered by this Court in *United States* v. *McShain*, 308 U. S. 512, and *United States* v. *Blair*, 321 U. S. 730. Its critical provisions differ from those in the standard form of Government construction contract in that the latter limits the finality of administrative decision to questions of fact. See *United States* v. *Callahan Walker Co.*, 317 U. S. 56, 58. Article 15 of the contract provides that, with the exception of labor disputes, all "disputes concerning questions arising under this contract shall be decided by the Contracting Officer, * * * subject to

written appeal by the Contractor * * * to the head of the department * * * whose decision shall be final and conclusive upon the parties thereto as to such questions." In the instant case, after concluding that the action of the Government in specifying higher minimum wage rates for the construction of the superstructure constituted a breach of an implied condition of respondents' contract, the Court of Claims has held that this raised a question of law to which Article 15 was not intended to apply, and that if applicable to such a question of alleged breach of contract Article 15 is illegal and void. In so holding, we submit that the court below has erroneously decided important questions of Government contract law in a manner which cannot be reconciled with the controlling decisions of this Court delimiting judicial review of administrative settlement of Government contract claims.

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ave suggested on several recent occasions that the Cour[illegible] Claims inadequately recognized the right of the United States to provide by contract for the administrative settlement of disputes arising under its construction contracts. See petitions for a writ of certiorari in *United States* v. *McShain*, No. 43, October Term, 1939, pp. 6–9 (rev'd, *per curiam*, 308 U. S. 512); *United States* v. *Callahan Walker Co.*, No. 65, October Term, 1942, pp. 8–12 (rev'd, 317 U. S. 56); *United States* v. *Blair*, No. 75, October Term, 1943, pp. 18–19 (rev'd, 324 U. S. 730). No reference to these decisions appears in either of the majority opinions. The present holding formulates a theory of law forecast by the court's prior opinions in *Langevin* v. *United States*, 100 C. Cls. 15; *Bein* v. *United States*, No. 44619, decided December 6, 1943, slip. ops., pp. 22–26.

Article 15 of the contract requires an administrative settlement of disputes of the character here involved. The dispute centered on the causal relationship between the higher wage rates prescribed by the Government in its invitation for bids for the superstructure work, and respondents' payment of like wages on the foundations, concededly without any request or directions to do so by the Government. Intervening between these two acts were a strike by the Union of respondents' employees and a settlement thereof by agreement to pay the higher wage rate following negotiations in which the Government concededly did not participate. The administrative officials in considering the dispute did not misconceive the issues. The Assistant Administrator found that "the increase in wage rates was occasioned by no fault of the Government." (Fdg. 16). The Administrator found that not the acts of the Government but the signing of a new agreement with the union was the cause of the wage increase (Fdg. 18). Similar issues of proximate causality are traditionally treated as factual for resolution by a jury. *Bailey* v. *Central Vermont Ry.*, 319 U. S. 350, 354; *Tennant* v. *Peoria & P. U. Ry.*, 321 U. S. 29, 34-35; *Milwaukee & St. P. Ry.* v. *Kellogg*, 94 U. S. 469, 474. The findings of the Assistant Administrator and of the head of the department on this issue should have been accepted by the court below in the absence of a proper judicial finding that the administrative

determination was arbitrary, capricious, or so grossly erroneous as to imply bad faith. *Kihlberg* v. *United States*, 97 U. S. 398, 402; *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549, 553–554; *Plumley* v. *United States*, 226 U. S. 545, 547; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, 393; *Goltra* v. *Weeks*, 271 U. S. 536. No such judicial finding was made.[*]

Under Article 15 as it appeared in the contract, this should have been the scope of judicial review even if the issue be regarded as legal in nature. It is clear that the parties to the contract acted upon the belief that the specified officers had authority under Article 15 of the contract to pass upon the dispute in question and that it was submitted to them for that purpose. There is nothing in Article 15 which would exclude from its scope disputes which can be said to involve a "breach of contract." In a sense, every dispute revolves about a breach of contract, for any claim under the contract, and its denial, is predicated upon the contention that the contract does or does not require the action sought or refused. And in order to determine the question of a breach it is frequently necessary to interpret the rights and obligations created by the contract and specifications, a function which this Court has recognized

[*] Nor could such a finding rightly have been made, for, as indicated *infra*, pp. 14–17, it was entirely reasonable to conclude that respondent's increased wage cost was not due to any mandate or fault of the Government.

may be entrusted to administrative disposition. See *United States* v. *McShain*, 308 U. S. 512, 520; *Plumley* v. *United States*, 226 U. S. 545, 547; *Ripley* v. *United States*, 223 U. S. 695, 704; *Sweeney* v. *United States*, 109 U. S. 618, 620.

2. In rejecting the Government's construction of Article 15, the court below held that the parties could not validly stipulate that the finding of an administrative officer should be final as to whether either party had broken an expressed or implied term of the contract. That holding, we submit, runs counter to the applicable decisions of this Court. The Court stated in *United States* v. *Gleason*, 175 U. S. 588, 602, 604:

> Another rule is, that it is competent for parties to a contract, of the nature of the present one, to make it a term of the contract that the decision of an engineer, or other officer, of all or specified matters of dispute that may arise during the execution of the work shall be final and conclusive, and that, in the absence of fraud or of mistake so gross as to necessarily imply bad faith, such decision will not be subjected to the revisory power of the courts.
>
> * * * * * * *
>
> * * * In other words, the parties agreed that if the contractors should fail to complete their contract within the time stipulated, they should have the benefit of the judgment of the engineer as to whether such failure was the result of their own fault or of forces beyond their control, and, in the latter event, of his judgment as to

> what extension of time would be just and reasonable. Obviously the object of the provision in question was to prevent the very state of dispute and uncertainty which would be created if the present contention of the contractors were to prevail.

In *United States* v. *McShain*, 308 U. S. 512, 520, this Court in a *per curiam* opinion reversed the decision of the court below (88 C. Cls. 284) which had limited to questions of fact the applicability of the identical Article 15 here involved. Cf. *United States* v. *Blair*, 321 U. S. 730.

Other decisions of this Court have repeatedly recognized that authority may be validly conferred by the contract upon a designated officer, including an agent of the Government, to make final decisions on disputed matters arising under the contract, including questions usually regarded as issues of law. *Goltra* v. *Weeks*, 271 U. S. 536, 547–548; *United States* v. *Mason & Hanger Co.*, 260 U. S. 323, 326; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, 393; *Plumley* v. *United States*, 226 U. S. 545, 547; *Ripley* v. *United States*, 223 U. S. 695, 704; *Sweeney* v. *United States*, 109 U. S. 618, 620; *Kihlberg* v. *United States*, 97 U. S. 398, 402; *Bayne* v. *Morris*, 1 Wall. 97; cf. *Burchell* v. *Marsh*, 17 How. 344, 350–351. In most of these cases, the contract provided that the designated official should determine whether one party to the contract had complied with his obligations thereunder. A finding that he had

not was, of course, a finding that he had broken the contract; a converse finding would be a finding that there was no breach. In the majority of these cases the designated official did pass upon such matters, and it is implicit in the opinions that such matters could properly be left for decision to an officer of the Government. In both the *Mason & Hanger* and the *Merrill-Ruckgaber* cases the contention was made, as in the present case, that it was beyond the competence of the contracting officer to decide a legal question. In each case the contention was rejected.[9]

These decisions constitute an answer to the view expressed in Judge Whitaker's opinion that if Article 15 is applicable to the instant dispute it is against public policy as an agreement to preclude recourse to the courts, and as an agreement conflicting with the statutory jurisdiction of the Court of Claims to hear and determine contract claims against the United States (Jud. Code § 145). The cases relied upon by the court below to support the first of these propositions were cases where state law sought to preclude access to the federal courts, or where all resort to courts was barred by agreement. Here there is

[9] See Brief for the United States in *United States* v. *Mason & Hanger Co.*, Nos. 121-122, October Term, 1923, pp. 17-18; Petition for the United States for Rehearing, pp. 25-26; Brief for the United States on rehearing, p. 7; Brief for Appellant in *Merrill-Ruckgaber Co.* v. *United States*, No. 281, October Term, 1915, pp. 11, 14.

neither. The claimant is free to resort to the courts, the only effect of the stipulation being to narrow the field of judicial inquiry—a familiar result of the finality accorded by statute to administrative findings. Cf. *Gray* v. *Powell*, 314 U. S. 402, 411–412. The same principles answer the contention that Article 15 conflicts with the court's jurisdiction under Section 145 of the Judicial Code, a contention unsuccessfully urged in almost identical form by the respondent in *United States* v. *McShain*, 308 U. S. 512. See Respondent's brief in No. 43, October Term, 1939, pp. 9–10, 11–12.[10]

3. Declining to accord finality to the ruling of the head of the department, the court below decided as an original question that the Government was the responsible cause of the increase in respondents' wage rates. While the construction and validity of Article 15 relating to finality present the important issues for review; and if that issue is decided in accord with our contentions the question whether there was a breach of

[10] The observation in Judge Madden's concurring opinion that a decision by a contracting officer would be "meaningless" because that officer could make an award only for, but not against, the Government is unsound. The decision of the Government officers may be of considerable value to an aggrieved party seeking redress (see *United States* v. *Blair*, 321 U. S. 730, 737–738) and is often accorded finality even where the Government's fiscal agents refuse to accept it. See e. g., *United States* v. *Mason & Hanger Co.*, 260 U. S. 323, 325–326; *Coomb Company* v. *United States*, 100 C. Cls. 240, 247.

contract need not be decided, we shall maintain, if it becomes relevant, that there was no breach of contract by the Government. It seems plain, though two members of the court concluded otherwise, that there was no breach of Article 19, since the Government imposed no obligation on the respondent to pay higher wages than the minimum fixed in the contract, and since under Section 12 of the specifications the Government disclaimed liability for additional compensation because of higher wage rates than those contained "herein." Nor was there a breach of an implied undertaking not to make performance more expensive. The inference that in publishing invitations to bid on the superstructure with higher specified minimum wage rates the Government made it "well nigh inevitable" that respondents' employees would effectively insist on the higher wage is, we submit, not properly to be drawn from the record.

At the time respondents entered into the contract, the Building Trade Employers' Association of Chicago and the Unions of the City of Chicago had an agreement which fixed the same minimum rates as those provided in the contract, and which was to expire on May 31, 1936 (Fdg. 19).[11]

[11] The fact that the head of the department incorrectly concluded that that agreement expired January 1, 1936, is of no significance. In fact, the later date would suggest that respondent was more completely protected by the wage agreement.

It was only shortly after that date that respondents completed their work on the foundation (Fdg. 14). The superstructure could of course not be erected until the foundations were completed, but it was necessary that the contract for the superstructure be advertised and entered into in advance, so that work thereon could commence without delay after respondents had completed the foundation. Accordingly, the invitation to bid upon the superstructure work was issued in February 1936, but the increased wage rates specified therein necessarily would not take effect until after respondents' contract had been completed. Notwithstanding the contrary inference drawn by the court below, there is nothing to indicate that the Government had any reason to believe that its announcement that higher rates would be required in the future would entail a retroactive change in respondents' wage agreement. In this aspect, the Government's action was even more clearly reasonable than in *Le-Veque* v. *United States*, 96 C. Cls. 250, where the court below held that an increase by the Government of the minimum wage rates on other projects in the same city, which were under way at the same time as the plaintiff's, did not constitute a breach of contract. See also *Dravo Corp.* v. *United States*, 93 C. Cls. 734, 758. And nothing in the instant contract bound the Government to prescribe the same minimum wage rates for

the later phases of the project as it had prescribed for the foundations.

4. The question is one of importance. It is a matter of common knowledge that the United States annually enters into a vast number of contracts many of which contain a clause similar to Article 15 here involved providing for administrative settlement of disputes. If such a stipulation can be rendered inapplicable by phrasing the dispute in terms of the breach of an express or implied term of the contract, the effect of the submission to administrative decision will be nullified in most cases, even where the dispute centers on a purely factual question. It is respectfully submitted that the decision below, marking a distinct departure from the rationale of similar cases heretofore decided by this Court, should be reviewed.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition should be granted.

CHARLES FAHY,
Solicitor General.

SEPTEMBER 5, 1944.

APPENDIX

CONTRACT PROVISIONS

ART. 3. *Changes.*—The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this Contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this Contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than $500 shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered, unless the Contracting Officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the Contractor from proceeding with the prosecution of the work so changed.

* * * * *

ART. 15. *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by the Contracting Officer shall be submitted to the Head of the Department. Except as

otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the Contracting Officer or his duly authorized representative, subject to written appeal by the Contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the Contractor shall diligently proceed with the work as directed.

* * * * * *

ART. 18. *Wages.*—(a) There shall be paid each employee engaged on the project in the trade or occupations listed in the Specification, the hourly, weekly, or monthly wage prescribed for the same in the Specification. If, after the award of this contract, it becomes necessary to employ any person in a trade or occupation not listed in the Specification, such person shall be paid an hourly, weekly, or monthly rate of wage fairly comparable to the rates contained in the Specification as shall be approved by the head of the department and such wage rates shall be retroactive to the time of the initial employment of such person in such trade or occupancy.

(b) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work shall be posted in a prominent and easily accessible place at the site of the work; and the Contractor shall keep a true and accurate record of the hours worked by and the wages paid to each employee, and shall furnish the Contracting Officer with a sworn statement thereof on demand.

All employees shall be paid in full not less often than once each week and in lawful money of the United States in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process.

ART. 19. (a) The wage rates established in the Specification shall be subject to change by the Federal Emergency Administration of Public Works. In the event that the Federal Emergency Administration of Public Works establishes different wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the Contractor, whether under this contract or any subcontract.

(b) The Contractor and each subcontractor shall prepare the pay rolls upon forms to be prescribed and in accordance with instructions to be furnished by the Works Progress Administration. Not later than the third day following the payment of wages, a certified legible copy of each pay roll, whether paid by the Contractor or any subcontractor, shall be transmitted by the Contractor to such office as may be designated by the Works Progress Administration. The Contractor and each subcontractor shall submit reports at such times and on such forms as may be required by the Works Progress Administration, covering purchases of, and requisitions for, materials, together with such other information as may be

required to determine the progress and status of the completion of the work on the project.

(c) The Contractor and each subcontractor shall report to the United States Department of Labor monthly within 5 days after the close of each calendar month, upon forms to be prescribed, and in accordance with instructions to be furnished, by the United States Department of Labor, covering the number of persons on their respective pay rolls directly connected with the project, the aggregate amount of such pay rolls and man-hours work, and an itemized statement of the total expenditures for materials. The Contractor shall also furnish to the United States Department of Labor the names and addresses of all subcontractors on the work at the earliest date practicable.

(d) The Works Progress Administration through its authorized agents shall have the right to inspect all work as it progresses and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract.

SPECIFICATIONS

Paragraph 1 of Section 12 of Division I of the specifications provided that:

> Subject to the specification, general conditions and the contract, there shall be paid each Employee in the Trade or Occupation listed below not less than the hourly wage rate set opposite same. * * *

Carpenters	$1.2125
Cement finishers	1.3125
Hoisting engineers	1.3125
Common laborers	.825

Paragraph 2 of Section 12, *supra*, provided that:

> The above wage rates are subject to review and adjustment by the Federal Emergency Administrator of Public Works, as provided in Article 19 (a) of the contract.

Paragraph 4 of Section 12, *supra*, provided that:

> The Government will not consider any claims for additional compensation made by the Contractor because of payment by the Contractor of any wage rate in excess of the applicable rate contained herein. All disputes in regard to the payment of wages in excess of those specified herein shall be adjusted by the Contractor.

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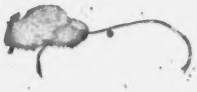

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No. 431

In the Supreme Court of the United States

OCTOBER TERM, 1944

THE UNITED STATES, PETITIONER

v.

JOSEPH H. BEUTTAS, JOHN W. BEUTTAS, AND PAUL H. BEUTTAS, TRADING AS B-W CONSTRUCTION CO., NOT INC.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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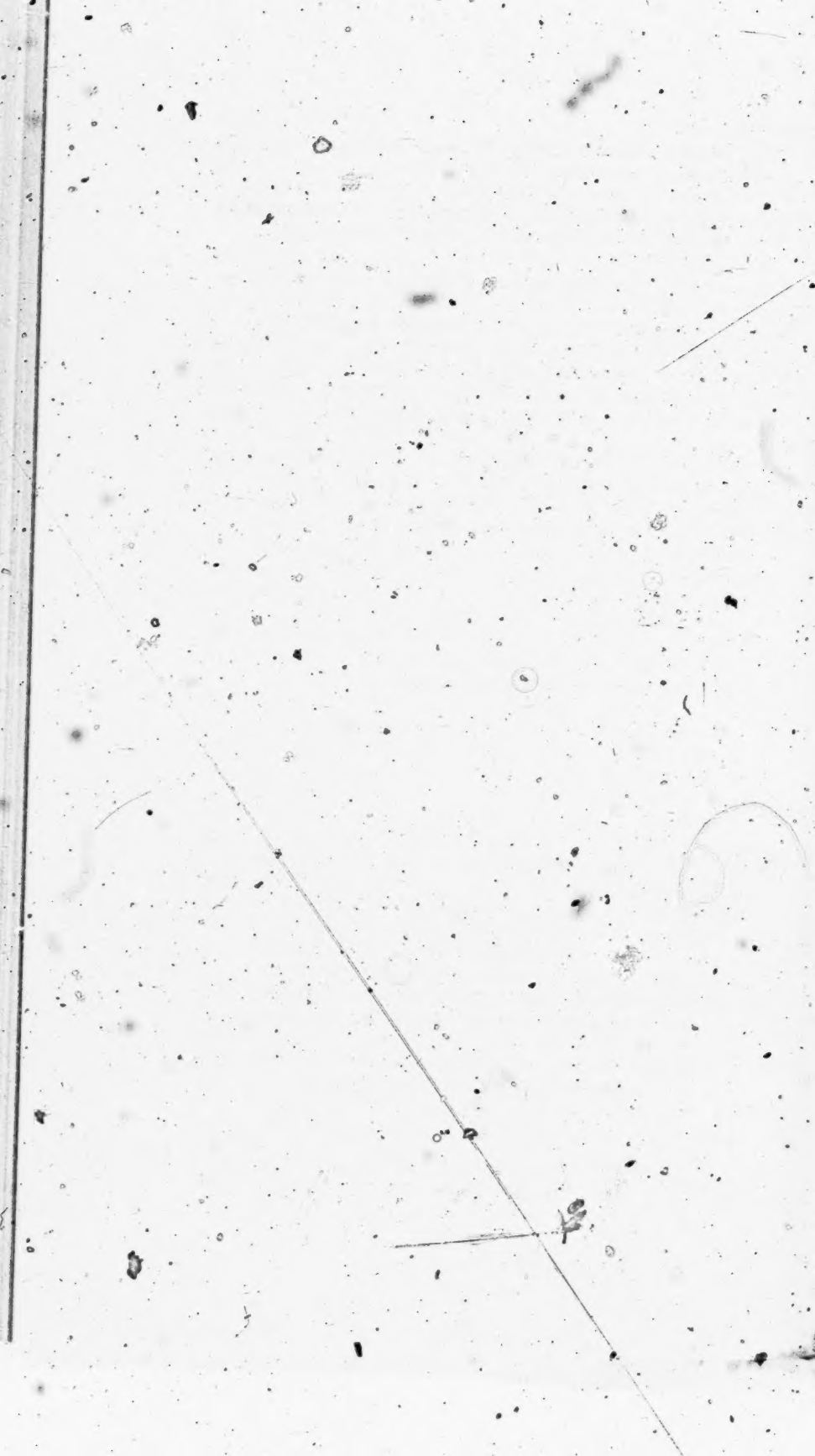

In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the Court of Claims (R. 34–45) are not yet officially reported.

JURISDICTION

The judgment of the Court of Claims was entered June 5, 1944 (R. 45). The petition for a writ of certiorari was filed September 5, 1944, and granted November 20, 1944. The jurisdiction of this Court rests upon Section 3 (b) of the Act of February 13, 1925, as amended, 28 U. S. C. 288.

QUESTIONS PRESENTED

1. Whether article 15 of a standard form Government contract, which provides that the decision of the head of the department on all "disputes concerning questions arising" under the contract shall be final and conclusive upon the parties, applies to a finding by the head of the department that the Government did not establish higher wage rates under the contract than those originally specified therein and that the contractor's payment of higher wages was not caused by acts of the Government.

2. Whether, if article 15 of the contract was intended to apply to such a finding, it could validly be agreed to by the parties.

3. Whether the Government, by inviting bids for the building of superstructures to be erected under separate and later contracts, specifying minimum wages which were higher than those fixed in respondents' contract for constructing the foundations of the same buildings during an earlier period, thereby (1) established "different wage rates" under article 19 (a) of the foundation contract so as to entitle the contractor to an adjustment thereof, or (2) violated any implied obligation in respondents' contract.

CONTRACT PROVISIONS INVOLVED

The contract provisions involved are set forth in the Appendix, *infra*, pp. 45–49.

STATEMENT

Respondents, who are engaged in the building construction business in Chicago, entered into a contract with the United States on November 26, 1935, to construct the foundations of the Jane Addams Houses, a Public Works Administration project in Chicago (Fdgs. 1, 2; R. 22). The work was duly completed on May 19, 1936 (Fdg. 18; R. 31).[1]

Article 18 of the contract and the related specifications required that employees engaged on the project be paid the minimum hourly wage rates set forth therein (Fdg. 5; R. 23), and the specifications provided that:

> "The Government will not consider any claims for additional compensation made by the Contractor because of payment * * * of any wage rate in excess of the applicable rate contained herein. All disputes in regard to the payment of wages in excess of those specified herein shall be adjusted by the Contractor." (Fdg. 5; R. 24.)

Article 19 of the contract, also referred to in the specifications, provided that the listed wage rates should be "subject to change by the Federal Emergency Administrator of Public Works," and that

[1] The work was to be completed within 75 calendar days after receipt of notice to proceed (*i. e.*, by February 23, 1936), but completion was delayed by various change orders and other causes for which extensions of time were granted by the United States (Fdg. 2, 9; R. 22, 25–26).

if the Administrator "establishes different wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the Contractor" (Fdg. 5; R. 24).

Respondents began work under the contract in December 1935 and paid the rates of wages set forth in the contract until sometime in February or March, 1936 (Fdg. 12; R. 27). On February 15, 1936, the Government issued an invitation for bids for the superstructures of the buildings for which respondents were constructing the foundations. That invitation specified minimum wage rates which were higher than those being paid to respondents' employees, who were unionized.[2] The Government did not request that respondents pay the higher rate of wages, but in February or March, 1936, the union of respondents' employees called a strike to compel respondents to pay wages equal to those specified for the superstructures, and respondents acceded to the union's demand for payment of the higher wage rates retroactively to January 8, 1936 (Fdg. 12; R. 27–28). The Government did not participate in

[2] The differences were as follows, in rates per hour (Fdgs. 5, 12; R. 23, 27):

	Foundations	Superstructure
Common laborers	$.50½	$.6[illegible]
Carpenters, cement finishers and hoisting engineers	1.31½	1.[illegible]

the negotiations between respondents and the strikers (Fdg. 13; R. 28).

Respondents claimed reimbursement for the increase in wages, and a dispute arose as to the right thereto, respondents contending *inter alia* that petitioner "had established higher wages on the project" (Fdg. 14; R. 28). Article 15 of the contract provides that all "disputes concerning questions arising under this contract [except labor disputes] shall be decided by the Contracting Officer * * *, subject to written appeal by the Contractor * * * to the head of the department * * * whose decision shall be final and conclusive upon the parties thereto as to such question." (See *infra*, pp. 45–46.) The dispute as to the wage increase was duly submitted to the contracting officer, who rejected the wage claim (Fdg. 15; R. 28–29).[1] Respondents thereupon appealed to the Assistant Administrator of Public Works, who on June 29, 1936, ren-

[1] Other items of claim were also submitted for damages alleged to have resulted from the changes and delay caused by the Government. The contracting officer and the head of the department found that respondents were entitled to $8,743.42 therefor (Fdg. 15; R. 30). Petitioner and respondents stipulated below that respondents were entitled to recover $8,727.44 for all claims other than those resulting from wage increases, and that judgment might be entered for that amount (Fdg. 11; R. 27). Consequently, those parts of the findings below relating to delay and the damages occasioned thereby (especially Fdgs. 7–11; R. 24–27) are not material to the questions here involved.

dered a written decision with findings of fact, wherein he found that "the increase in wage rates was occasioned by no fault of the Government," and rejected the claim (Fdg. 16; R. 30). Respondents then petitioned the Federal Emergency Administrator of Public Works (the "head of the Department" under the contract, R. 20) to decide and allow the claim "as a part of the equitable adjustment under the contract" (Fdg. 17; R. 31). On May 20, 1937, in a letter to the Comptroller General, the Administrator rendered findings of fact and conclusions, disallowing the wage claim.[4] The Administrator found that "there were no fundamental changes in economic conditions as contemplated by Article 19 (a)" of the contract; that the minimum rates specified in the contract were in accordance with those set forth in an existing agreement between the Building Trade Employers' Association (of which re-

[4] The Assistant Administrator and the Administrator also found (Fdg. 16; R. 30; Fdg. 18; R. 32–33) that respondents had suspended work on the foundations, at the Government's request, from December 12, 1935, to February 17, 1936; that had respondents been permitted to work from December 12, 1935 (the first work day after the stop order) to January 8, 1936 (the date to which the increase in wage rates was made retroactive under respondents' agreement with the unions), respondents would have been able to obtain workers at the lower rates; and that as a result thereof the contractor incurred an extra expense of $909. The Administrator recommended that this sum be paid to respondents as "an item of damages against the Government" (R. 33), but payment was refused by the Comptroller General (R. 34).

spondents were members) and the unions in Chicago; and that the wages were increased, not by "the acts of the Government, in advertising for the superstructure contract" at higher wage rates, but because of the execution of a new wage agreement by respondents with the union after the contract with the Government was entered into (Fdg. 18; R. 31–34). The Comptroller General thereupon refused to authorize payment of the controverted item (R. 34) and respondents brought suit in the Court of Claims, charging that the P. W. A. had established "different wage rates by increasing the same" pursuant to Article 19 (a) of the contract, "as a result of which the plaintiffs were compelled to pay said increased rates" (R. 4, par. 9). That court entered judgment for respondents in the sum of $13,388.27.[1]

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

1. In holding that by inviting bids for the superstructure at minimum wage rates higher than those set forth in respondents' contract the United

[1] The judgment for $13,388.27 consists of $4,660.83 as the excess wages paid, and $8,727.44 as the stipulated recovery on account of the changes and delays (see n. 3, p. 5, *supra*). Since in the Government's view the findings of the Administrator, allowing $909 for excess wages, were conclusive under article 15 of the contract, we challenge here only that part of the judgment which exceeds $9,636.44 (the stipulated $8,724.44, plus the $909 item).

States violated an express or implied obligation of that contract.

2. In rejecting administrative findings of fact that the increased wages paid by respondents were not caused by the invitation for bids, without determining that the administrative findings were arbitrary, capricious, or so grossly erroneous as to imply bad faith.

3. In holding that the administrative decision related to a question of law.

4. In holding that article 15 of the contract was not intended to make the decision of the head of the department final and conclusive with regard to "disputes concerning questions arising under" the contract when the disputes concern questions of law or involve possible breach of contract by the Government.

5. In holding that a contrary construction of article 15 would make that provision illegal.

6. In entering judgment for respondents for the increased wages paid by them.

SUMMARY OF ARGUMENT.

Article 15 of the contract here involved provides that the decision of the "head of the department" shall be "final and conclusive" with respect to all "disputes concerning questions arising under the contract." The instant dispute arose upon respondents' claim that by specifying higher minimum wage rates for the superstructures to be

erected after respondents had completed the foundations, the Government "established" higher wage rates under the contract, thereby creating a liability for reimbursement of the added cost. The claim was submitted to and rejected by the contracting officer and, upon appeal, by the "head of the department", who found that payment of the higher wages by respondents was occasioned not by any act of the Government but by a strike of respondents' employees and by respondents' yielding to their demands. This decision was entitled to finality under the terms of article 15, in the absence of a showing of arbitrariness or such gross error as to imply bad faith.

I

The court below treated article 15 as applicable solely to disputes of a factual nature. We submit that even under this view the instant dispute is included. The determination of whether a breach of contract has been committed is factual, and administrative determinations in analogous cases have been accorded finality. The underlying question of causation which is present in this case is at least a "mixed" question, the administrative determination of which is entitled to similar treatment.

Even if the question be viewed as one of law, the administrative determination should be regarded as final under article 15. Numerous de-

cisions of this Court have given effect to similar provisions as applied to questions of interpretation of contract. The submission of such disputes to administrative disposition does not, as the court below held, oust the courts of jurisdiction, but merely narrows the field of judicial inquiry. The decision below does not find support in the common law with respect to contracts to arbitrate or in Section 145 of the Judicial Code, conferring jurisdiction upon the Court of Claims.

The distinction between fact and law is, we submit, not relevant here, since the purpose of providing in a contract for administrative decisions clearly is to secure prompt determination of all questions. That purpose would be defeated by introducing concepts which are relevant elsewhere but have no proper application here.

II

Article 15 to one side, we submit that the action of the Government did not constitute a breach of either an express or an implied condition of respondents' contract. Article 19 (a) of the contract and paragraph 4 of section 12 of the specifications expressly apprised respondents that they would not be reimbursed for wage increases unless the Government established them under the contract. That no wage rates other than the original minimum rates were ever established for respondents is conclusively demonstrated by the fact that respondents were never obligated

to pay any higher wages than those listed in the contract. Since the findings of the court itself are that the Government "did not at any time expressly request [respondents] to pay higher wages" on their job, and did "not participate in the negotiations between [respondents] and the striking workmen," there is no justification for the conclusion that by prescribing higher wage scales for the superstructures to be erected after completion of respondents' contract, the Government established "different wage rates" on respondents' project.

The Government did not violate any implied obligation of respondents' contract by causing its performance to become more expensive. There is no hint that the Government desired or intended to bring about increased wages on respondents' job. The express terms of the contract and specifications place the burden of increased labor costs on the contractor save only when the Government establishes higher wage rates under the contract; and these provisions preclude importing an inconsistent implied obligation into the contract. In a legal sense, respondents' payment of higher wages resulted from their own new agreement with their employees, induced by a successful strike, and not from the action of the Government, which was justified in specifying different wages upon the superstructures.

ARGUMENT

Article 15 of the contract provides that "disputes concerning questions arising under this contract shall be decided by the Contracting Officer * * * subject to written appeal by the Contractor * * * to the head of the department * * * whose decision shall be final and conclusive upon the parties thereto as to such questions." A dispute arose between the parties as to whether the Government, by prescribing higher minimum wage rates for the superstructures to be erected after this contract was completed, had established higher wages requiring reimbursement of the added cost under article 19 of the contract. This dispute was submitted by respondents to the contracting officer and his adverse decision was successively appealed to the Assistant Administrator and the Administrator, both of whom decided the dispute against respondents (R. 30, 32). But despite the express terms of article 15 of the contract the Court of Claims refused to hold the Administrator's "decision * * * final and conclusive upon the parties."

This disregard of the parties' antecedent stipulation was not rested upon the familiar exceptions to the finality of the administrative decision in such circumstances—i. e., arbitrariness, caprice, fraud, or such gross error as to imply bad faith. See R. 39; Cf. *Kihlberg* v. *United States*, 97 U. S. 398, 402; *United States* v. *Gleason*, 175 U. S. 588,

602. It was instead based upon the conclusion that the parties did not mean what they appeared to say in article 15, and that, if they did, their agreement was to that extent illegal.[6] The majority of the court held that the Government's specification of higher minimum wages for the superstructures required respondents "as a necessary consequence" to pay higher wages on their job and was a breach of "an implied condition" of the contract to refrain from any act which would make respondents' performance more expensive; that article 15 of the contract was not intended to apply to questions of breach of contract; and that, if it were so intended, it was illegal and beyond the competence of the parties (R. 34–42). Two of the three judges in the majority[7] also ruled that the Government had indirectly "established" higher wage rates on respondents' job and was therefore "obligated to pay the increase under article 19", and that its action raised a question of breach of contract which article 15 did not and could not cover (R. 36).

[6] The exact holding of the Court of Claims is somewhat confused by the fact that several opinions were written. The case was decided in favor of respondents by three members of the court. Judge Whitaker delivered "the opinion of the court" (R. 34), in which Chief Justice Whaley alone concurred (R. 40), and Judge Madden wrote a separate concurring opinion (R. 40–42). Judge Littleton dissented (R. 42–45) and Judge Jones did not participate (R. 45).

[7] In the opinion by Judge Whitaker.

We submit that the decision below is erroneous, whether the dispute between the parties be regarded as involving a question of fact, a mixed question of law and fact, or a question of law; that the parties intended and had the right to enter into a binding agreement for the administrative settlement of all such disputes; and that the decision of the head of the department on the disputed question was accordingly final and conclusive on the parties. We further submit that, irrespective of article 15, the action of the Government in the instant case did not constitute a breach of either an express or an implied term of the contract.

I

ARTICLE 15 WAS INTENDED TO APPLY TO THE INSTANT DISPUTE

Article 15 of the contract makes "final and conclusive" the decision by the head of the department of "all * * * disputes concerning questions arising under this contract," except "labor issues" and "except as otherwise specifically provided in this contract" (R. 23; Appendix pp. 45–46, *infra*). Since it is not contended that either exception is pertinent,[8] the principal issue

[8] Nothing in the contract specifically excepts the instant dispute from article 15. "Labor issues" arising under the contract, which article 15 requires to be submitted to the head of the department if they "cannot be satisfactorily adjusted by the Contracting Officer", clearly embrace only issues between employer and employees.

here would seem to be whether the present dispute concerns any "questions arising under this contract." The findings of fact of the court below definitively answer this inquiry. The court found that a "dispute arose between the parties to the contract * * * as to reimbursement * * * for the additional wages," respondents contending that the Government "had established higher wages on the project" and asserting a right to reimbursement under the contract (R. 28–29); that this dispute was submitted to the contracting officer who rejected the claim (R. 28–29); and that on appeal the Administrator affirmed the rejection, making an express finding that wages had not been increased pursuant to article 19 (a) of the contract (R. 32).[9]

Both parties proceeded in the belief that article 15 prescribed the applicable administrative procedure, the dispute being submitted to and passed upon first by the contracting officer, then by the authorized representative of the head of the department (the Assistant Administrator), and finally by the head himself. Even if the broad language of article 15 admitted of alternative constructions, the meaning given to it by both parties would be dispositive. Williston, *Contracts* (rev. ed.) § 623; American Law Institute, *Restatement*

[9] The petition in the Court of Claims rests the right to reimbursement of excess wages upon article 19 (a), on the ground that the Government had "established" higher wage rates on the project (R. 4).

of Contracts, § 235 (e); *Pressed Steel Car Co.* v. *Union Pacific R. Co.*, 297 Fed. 788 (C. C. A. 2). The intention of the parties that article 15 should cover "all * * * disputes" under the contract not specifically excluded therefrom, whether those disputes related to questions of law or of fact, is further evidenced by a comparison of its language with that of article 9 of the same contract, relating to delay by the contractor, which makes the Administrator's decision final and conclusive only as to the "facts of delay" (R. 14).[10]

The dispute revolved about the casual relationship between the Government's prescription of higher wage rates in its invitation for bids for the superstructures and respondents' subsequent payment of like wages on the foundations, concededly without any request or direction to do so by the Government. Intervening between these two acts were a strike by the union of respondents' employees and a settlement thereof by agreement to pay the higher wages, following negotiations in which the Government concededly did not participate. The Assistant Administrator

[10] Article 15 in many other standard form government construction contracts is substantially the same as the instant article 15, except that it limits the finality of administrative decision to questions of fact. Such a contract was involved in *United States* v. *Callahan Walker*, 317 U. S. 56, 58. The form of government contract here involved is "U. S. Government Form P. W. A. 51" and is identical with those considered by this Court in *United States* v. *McShain*, 308 U. S. 512, and *United States* v. *Blair*, 321 U. S. 730.

found that "the increase in wage rates was occasioned by no fault of the Government" (R. 30); and the Administrator found that it was not the acts of the Government but the signing of a new agreement with the union which was the cause of the wage increase (R. 32).[11] Hence the administrative determinations were addressed to questions coming within the plain language of article 15. That fact; the wording of the article and its interpretation by the parties, and judicial interpretation of similar provisions in other contracts (see *infra*, pp. 21–26) seem clearly to show that disputes of the character here involved were intended to be covered.

---

[11] These findings, we submit, are inconsistent with Judge Madden's view (not joined in by the other members of the court) that the contracting officer never decided or "gave any consideration to" the sole question which he thought the court was called upon to decide—whether the Government broke an implied condition not to increase the contractor's cost of performance (R. 40). The findings of the administrative officers (R. 30, 32) were dispositive of the claim in whatever way it may be stated. Obviously the effect of article 15 cannot be evaded by couching the same claim in different legal terminology. Moreover, the administrative officers could only pass upon claims actually submitted, and here the findings of the administrative officers were responsive to the claim filed. If the "claim" changes its identity when presented in a different legal guise, then the respondents did not make a claim concerning the alleged breach of an implied condition of the contract and thus did not afford the contracting officer and the head of the department an opportunity to pass upon the matter administratively. This would bar them from asserting the claim in court. *United States* v. *Callahan Walker*, 317 U. S. 56, 61; *United States* v. *Blair*, 321 U. S. 730, 735.

II

ARTICLE 15 IS NOT ILLEGAL AS APPLIED TO THE INSTANT DISPUTE

The court below held that article 15 could validly apply only to "questions of fact arising as the work progressed" (R. 39), including the interpretation of the specifications, and could not be applied, even if so intended by the parties, to "the question of whether or not there has been a breach of the contract" (R. 37, 38, 39, 41). We submit that no matter whether the dispute be considered to involve article 19 of the contract or an implied obligation not to make performance more expensive, the parties could validly agree to submit it to final administrative decision. And this is so, in our view, whether the question be regarded as one of fact or as one of law in whole or in part.

A. THE DISPUTE RAISED A QUESTION OF FACT OR A MIXED QUESTION OF LAW AND FACT

The alternative issues of whether article 19 of the contract required that respondents be reimbursed for the increased wages which they paid or whether the Government committed a breach of contract by specifying higher wages upon the superstructures, constitute issues relating to performance and breach which, in an action at law, would be left to the jury. *Simmons* v. *Snow*, 275 U. S. 113; *Lincoln* v. *Orthwein*, 120 Fed. 880 (C. C. A. 5); *Nelson* v. *Chicago Mill & Lumber*

Corp., 76 F. (2d) 17, 23 (C. C. A. 8); *Crocker Chair Co.* v. *Hines Hardwood & H. Co.*, 201 Wis. 415, 230 N. W. 61. It follows that they should be regarded as issued upon which the administrative determination is final, even if finality under article 15 is limited to determinations of fact. See *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549, 533–554; *Plumley* v. *United States*, 226 U. S. 545, 547; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, 393; *Goltra* v. *Weeks*, 271 U. S. 536. The same conclusion results if the question be regarded as one of mixed fact and law. Cf. *United States* v. *Esnault-Pelterie*, 303 U. S. 26, 29. See also the decisions involving the conclusiveness of the determinations of statutory administrative bodies in *Gray* v. *Powell*, 314 U. S. 402, 411–414; *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 145–146; *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 184–185. The administrative determination of even such questions as the interpretation of clauses contained in a contract or specifications, as distinguished from merely the application of such provisions to particular fact situations, has been held to be conclusive under provisions similar to article 15 of the contract in the present case (see *United States* v. *McShain*, 308 U. S. 512, 520; *Plumley* v. *United States*, *supra*; *Ripley* v. *United States*, 223 U. S. 695, 704; *Sweeney* v. *United States*, 109 U. S. 618, 620); and the court below concedes that this is so (R. 39).

Underlying the issues of the Government's obligation to reimburse the respondents or, in the alternative, to pay damages for the breach of an implied obligation to refrain from rendering respondents' performance more expensive is a question of causation, namely, whether the Government's act in specifying higher wages upon the superstructures was the cause of the higher wages which respondents paid. As will be developed further below (see *infra*, pp. 39–43), we believe that this question was rightly determined administratively and wrongly decided below. At least some of the factors which must be taken into account in determining causation are, moreover, clearly factual. See *Milwaukee & St. Paul Ry.* v. *Kellogg*, 94 U. S. 469, 474; Green, *Judge and Jury* (1930) p. 191; Harper, *Torts* (1933) pp. 256–257. The Administrator's conclusion consequently turns upon at least a mixed question upon which his determination should be regarded as final.

B. ARTICLE 15 MAY VALIDLY APPLY EVEN IF THE DISPUTE BETWEEN THE PARTIES BE VIEWED AS INVOLVING A QUESTION OF LAW

The court below held that the parties could not validly stipulate that the decision of an administrative officer of the Government shall be final in the circumstances at bar, because

> leaving to the final judgment of the engineer or architect the question of whether or not there has been a breach of the con-

> tract and preventing resort to the courts for a determination of that question and for enforcement of rights thereby accruing have never been upheld. (R. 38) [12]

We submit that the foregoing statement is out of line with previous decisions of this Court.

In *United States* v. *Gleason*, 175 U. S. 588, the dispute submitted to the contracting officer for decision under a provision similar to article 15 was whether the contractors' failure to complete the work on time was a "result of their own fault or of forces beyond their control" (175 U. S. at 604). This was in effect a determination of whether the contractors had broken their contract by completing the work late. In according finality to the contracting officer's decision, this Court said (at pp. 602, 604):

> Another rule is, that it is competent for parties to a contract, of the nature of the present one, to make it a term of the contract that the decision of an engineer, or

[12] The court's statement that article 15 should be applied only to "questions of fact arising as the work progressed" (R. 39), is virtually identical with its position in *McShain* v. *United States*, 88 C. Cls. 284, 297 (reversed, *per curiam*, 308 U. S. 512, 520). There the court quoted the following dictum from its previous decision in *Davis* v. *United States*, 82 C. Cls. 334, 346: "But the competency of the parties to so stipulate, as the courts have many times pointed out, is limited to the decision of questions of fact arising under the contract * * * They are questions which the parties to a contract may properly submit to the determination of the contracting officer or head of the department and lawfully agree to be bound by his decision."

other officer, of all specified matters of dispute that may arise during the execution of the work shall be final and conclusive, and that, in the absence of fraud or of mistake so gross as to necessarily imply bad faith, such decision will not be subjected to the revisory power of the courts.

* * * * * *

* * * In other words, the parties agreed that if the contractors should fail to complete their contract within the time stipulated, they should have the benefit of the judgment of the engineer as to whether such failure was the *result of their own fault or of forces beyond their control* * * *. [Italics added.]

Goltra v. *Weeks*, 271 U. S. 536, is authority for the validity of a provision attaching even more drastic consequences to the decision of an administrative officer with respect to breach of a government contract. There, a lease of Government-owned vessels authorized the Secretary of War to terminate the lease if in his "judgment" there was "non-compliance" by the lessee with its provisions (271 U. S. at 540). The Secretary of War found that the lessee had not complied with the lease and accordingly terminated it. In a suit to enjoin the War Department from seizing the vessels, this Court held that the Secretary's determination was conclusive and not subject to judicial review, stating as follows (271 U. S. at 548):

> The cases leave no doubt that such a provision for termination of a contract is valid, unless there is an absence of good faith in the exercise of the judgment. * * * Such a stipulation may be a harsh one or an unwise one, but it is valid and binding if entered into. It is often illustrated in government contracts in which the determination of a vital issue under the contract is left to the decision of a government officer. *Kihlberg* v. *United States*, 97 U. S. 398; *Sweeny* v. *United States*, 109 U. S. 618; *United States* v. *Gleason*, 175 U. S. 588; *United States* v. *Mason & Hanger Co.*, 260 U. S. 323; *United States* v. *Henley*, 182 Fed. 776; *Martinsburg R. R. Co.* v. *March*, 114 U. S. 549.

To exclude from article 15 all disputes involving "breach of contract," as did the court below, would virtually emasculate that provision. In a sense, almost every dispute under a contract revolves about an alleged breach, for any claim may be predicated upon the express or implied contention that the contract does or does not authorize particular acts. Questions of "the proper interpretation of the requirements of the contract documents, the fitness of the materials, and the sufficiency and amount of the work", which the court conceded were properly covered by article 15 (R. 39), necessarily involve the scope of the rights and obligations created by the contract no less than the question at bar. A dispute similar to the

present one was involved in *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, in which the question was whether the contract required the contractor to do more work than he thought it did. The contract provided that "the decision of the Supervising Architect as to the proper interpretation of the drawings and specifications shall be final." Upholding an administrative decision of the Supervising Architect (affirmed on appeal by the Secretary of the Treasury) that a certain number and type of underpinnings was required for buildings adjacent to the construction work, this Court stated (p. 393):

> If we may concede to appellant an ambiguity in the specifications * * * at the utmost it could only be said that there was ground for dispute, and under the contract the decisions of the Architect upon the dispute was final.

The court below thought that the contractor's obligation under article 15 to "proceed with the work as directed" during the determination of the dispute "negatives the idea that after the contractor had done all the work required of him, the contracting officer should decide whether or not he had been paid all he was entitled to" (R. 39–40). But this was also the situation in *United States* v. *Mason & Hanger Co.*, 260 U. S. 323, affirmed upon rehearing, 261 U. S. 610. There the contract provided that the contractor should be reimbursed for costs actually sustained "in con-

nection with said work,'" and that, if there was disagreement, "the decision of the contracting officer shall govern." The contracting officer decided that the premium on certain bonds, previously paid by the contractor, was a cost sustained "in connection with said work." The decision involved construction of the contract with reference to past events. The decision was held binding upon the United States, as it would have been upon the contractor had it gone the other way, and recovery of the amounts withheld was allowed.

In both the *Merrill-Ruckgaber* and the *Mason & Hanger* cases, as in the present case, the contention was advanced that the decision of the contracting officer was not conclusive because it involved a legal question and was beyond his competence. In each case the contention was rejected by this Court.[11] Many other decisions of this Court have given similiar effect to a provision such as that in article 15. See *Plumley* v. *United States*, 226 U. S. 545 (whether certain work required of the contractor was a "duly authorized change" under the contract, or whether the contract required payment of extra compensation); *Ripley* v. *United States*, 223 U. S. 695, 704

[11] See Brief for Appellant in No. 281, October Term, 1915, pp. 11, 14 (*Merrill-Ruckgaber*); Brief for the United States, pp. 17–18, Petition by the United States for Rehearing, pp. 15–26, and Brief for the United States on Rehearing, p. 7, in Nos. 121, 122, October Term, 1922 (*Mason & Hanger Co.*).

(whether the contractor's work complied with the specifications); *Martinsburg & Potomac R. R. Co.* v. *March*, 114 U. S. 549, 553 (whether the contract called for greater compensation than the engineering officer determined to be due); *Kihlberg* v. *United States*, 97 U. S. 398 (whether distances "ascertained and fixed by the chief quartermaster" were conclusive in fixing the compensation of a contractor to transport supplies). Numerous decisions in the lower Federal courts, in state courts, and in the English courts are to the same effect.[14]

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[14] *Barker* v. *City of New York*, 242 Fed. 350 (C. C. A. 2); *North American Ry. Const. Co.* v. *R. E. McMath Surveying Co.*, 116 Fed. 169 (C. C. A. 7); *Handy* v. *Bliss*, 204 Mass. 513. The following cases hold similarly with reference to the decisions of third-party arbitrators: *Warner Construction Co.* v. *Louis Hanssen's Sons*, 20 F. (2d) 483 (C. C. A. 8); *Memphis Trust Co.* v. *Brown-Ketchum Iron Works*, 166 Fed. 398, 404 (C. C. A. 6), cert. den., 214 U. S. 515; *Michigan Stone & Supply Co.* v. *Harris*, 81 Fed. 928, 931 (C. C. A. 6); *Deshon* v. *Scott's Adm.*, 202 Ky. 575; *Matter of Wilkins*, 169 N. Y. 494, 496; *Wenger & Co.* v. *Propper Silk Hosiery Mills*, 239 N. Y. 499; *Itoh & Co., Ltd.* v. *Boyer Oil Co.*, 198 App. Div. 881, 883-884; *Gerdetz* v. *Central Oregon Irr. Co.*, 83 Ore. 576; *Kingston Coal Co.* v. *Glen Alden Coal Co.*, 312 Pa. 546; *Ching* v. *Ching*, 6 Ves. Jr. 282, 31 Eng. Rep. 1052; *Young* v. *Walter*, 9 Ves. Jr. 364, 367, 32 Eng. Rep. 642, 644; *Steff* v. *Andrews*, 2 Madd. 6, 9, 56 Eng. Rep. 237, 238.

Some decisions exhibit a tendency to limit the scope of the submission by strict construction, stating that a power to interpret a contract or decide questions of law cannot be inferred but must be clearly stated, and a few of the older cases have carried this doctrine to questionable extremes. *E. g.*, *Gammino* v. *Inhabitants of Town of Dedham*, 164 Fed. 593.

Two of the three judges in the court below argued that article 15 would be illegal if taken to apply to the dispute in the present case, because it would be an invalid agreement to preclude recourse to courts and would, more specifically, conflict with Section 145 of the Judicial Code, 28 U. S. C. 250, conferring jurisdiction upon the Court of Claims to hear and determine claims against the United States "founded upon * * * any contract" (R. 37–39). The authorities relied upon to establish the invalidity of precluding resort to the courts are cases involving state statutes in which the attempt was made to prohibit resort to the Federal courts as a condition of doing business within the state, and cases in which contracts had been drawn to bar any resort whatever to the courts (R. 37–38). Neither factor is present here. The claimant is free to resort to the appropriate courts, without hindrance in the terms of the contract. The finality which is given to administrative decisions by article 15 results, of course, in narrowing the field of judicial inquiry (cf. *Gray* v. *Powell*, 314 U. S. 402, 411–413); but resort to the courts is not robbed of utility in proper cases since the administrative decision may be disregarded if it is arbitrary or capricious or so grossly erroneous as to imply bad faith (*supra*, p. 12). For the same reasons the conten-

600 (C. C. A. 1); *Salt Lake City* v. *Smith*, 104 Fed. 457 (C. C. A. 8); *King Iron Bridge Co.* v. *St. Louis*, 43 Fed. 768 (C. C. E. D. Mo.), appeal dismissed, 149 U. S. 769.

tion that article 15 conflicts with Section 145 of the Judicial Code is unsound. The same contention was urged unsuccessfully in almost identical form by the contractor in *United States* v. *McShain*, 308 U. S. 512. (See Respondents' Brief in No. 43, October Term, 1939, pp. 9–10, 11–12). This contention ignores the obvious truth that a claim founded upon a contract must come within the contract as written. The jurisdictional statute neither adds to nor detracts from the terms which may be included in a contract with the Government, the legality of which necessarily turns upon other provisions of law. A claim which has been properly rejected pursuant to a valid contractual provision is not given life by Section 145.

It is said by the judges below that even "arbitration agreements not authorized by statute, leaving to arbitrators the final determination of whether * * *, there has been a breach of the contract, are illegal" (R. 38). Assuming that there is an analogy between article 15 and an arbitration agreement, the postulate must still be rejected that such an arbitration agreement is illegal. It was well established at common law that "controversies involving questions purely of law [may] be submitted to arbitration" and that "the decision of the arbitrators in respect thereto is binding, although contrary to law, unless fraud or corruption is imputable." *Deshon* v. *Scott's Adm.*, 202 Ky. 575, 579; 260 S. W. 355, 356.

See also *Calhoun's Lessee* v. *Dunning*, 4 Dall. 120; *Burchell* v. *Marsh*, 17 How. 344; *Matter of Wilkins*, 169 N. Y. 494, 496; *Gerdetz* v. *Central Oregon Irr. Co.*, 83 Ore. 576; *Kingston Coal Co.* v. *Glen Alden Coal Co.*, 312 Pa. 546; *Ching* v. *Ching*, 6 Ves. Jr. 282, 31 Eng. Rep. 1052.[15]

The authorities relied upon below (R. 38–39), which hold that in the absence of statute (cf. United States Arbitration Act, 9 U. S. C. 1 *et seq.*) the courts will not compel specific performance of an agreement to arbitrate or give effect to such an agreement as a bar to an action, except where the agreement is plainly limited to the determination of an amount payable or other specific facts, extend no further than executory agreements to arbitrate.[16] See *Red Cross Line* v.

[15] At common law nothing could be done to correct errors of law made by the arbitrator. His decision was final and was unassailable in the absence of fraud or bias. *Mitchell* v. *De Schamps*, 13 Rich. Eq. 9, 23 (S. C. 1866); *Mayberry* v. *Mayberry*, 121 N. C. 248, 250, 28 S. E. 349. Under some statutes, also, arbitrators' decisions upon matters of law are final. *Deford* v. *Deford*, 116 Ind. 523, 19 N. E. 330. It has even been held that arbitrators may disregard statutory law. See *Darrow* v. *Braman*, 201 Mass. 469, 88 N. E. 5, where the arbitrator refused to consider the Statute of Frauds in making his award. Some statutes, however, specifically provide that the arbitrators must decide according to law. See statutes collected in Phillips, *Rules of Law or Laissez-Faire in Commercial Arbitration* (1934), 47 Harv. L. Rev. 590, 602–603, fn. 77, which also contains a general discussion of the duty of arbitrators to follow the law.

[16] The doctrine evidenced by these authorities has been condemned in scathing terms. See the classic opinion of Judge

Atlantic Fruit Co., 264 U. S. 109, 121; American Law Institute, *Restatement of Contracts*, Secs. 550, 551.[17] The well-settled rule is that if such an agreement is executed to the point of an award, it will be given effect. *Red Cross Line* v. *Atlantic Fruit Co., loc. cit. supra; Corbin* v. *Adams*, 76 Va. 58, 61. Here, respondents took full advantage of the provision in article 15 for administrative settlement of their dispute with the Government; the contracting officer made a decision; respondent appealed it to the Assistant Administrator and the Administrator; and both of these officials affirmed the decision. The "arbitration" provision has been executed and the court below erred in not giving it effect.

The Court of Claims thought that article 15 was even more vulnerable than an executory agreement to arbitrate because it left "the settlement of the dispute not to arbitrators but to an agent of one of the parties" to the contract, who would determine whether or not that party "had breached it" (R. 39). But the fact that the

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Hough in *United States Asphalt Refining Co.* v. *Trinidad Lake Petroleum Co.*, 222 Fed. 1006 (S. D. N. Y.). See also Williston, *Contracts* (rev. ed.) § 1919. In light of the widespread adoption of statutes by which agreements to arbitrate are made specifically enforceable, it may be doubted whether the policies upon which the early decisions were based retain their force. See statutes collected in Phillips, *The Paradox in Arbitration Law* (1933), 46 Harv. L. Rev. 1258.

[17] See also *Tobey* v. *County of Bristol*, 23 Fed. Cas. No. 14065, pp. 1320–1321; *Greason* v. *Keteltas*, 17 N. Y. 491, 496.

determination of a breach of contract was entrusted by the contract to an agent of the United States was held not to deny conclusiveness to his decision in *Goltra* v. *Weeks, supra*. There this Court stated (271 U. S. at 548):

> Nor does the circumstance that, as in this case, the lessor whose judgment is to prevail is a party to the contract alter the legal result. * * * He is a professional expert, as such was designated as lessor, and is really acting only as an agent for the Government. But even if this were a stipulation between private individuals, judgment of one of the parties on such an issue would be, in the absence of bad faith, conclusive.

See also *Kihlberg* v. *United States*, 97 U. S. 398, 401; *Choctaw & M. R. R. Co.* v. *Newton*, 140 Fed. 225, 232–233 (C. C. A. 8), certiorari denied, 202 U. S. 620; *Williams* v. *Chicago, S. F. & C. Ry. Co.*, 112 Mo. 463.[18]

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[18] The observation in Judge Madden's concurring opinion that a decision by a contracting officer would be "meaningless" because that officer could make an award only for, but not against, the Government is unsound. The decision of the Government officer may be of considerable value to an aggrieved party seeking redress (see *United States* v. *Blair*, 321 U. S. 730, 737–738) and is often accorded finality even where the Government's fiscal agents refuse to accept it. See e. g., *United States* v. *Mason & Hanger Co.*, 260 U. S. 323, 325–326; *Comb Company* v. *United States*, 100 C. Cls. 240, 247. Here the Government concedes the finality of that part of the Administrator's decision which is adverse to it, notwithstanding the Comptroller General's disagreement with that portion. See p. 7, n. 5, *supra*.

In the light of the foregoing, we respectfully submit that article 15, construed to embrace the dispute in the instant case, was within the competence of the parties, and the administrative decision thereunder is entitled to finality.

C. DISTINCTIONS BETWEEN QUESTIONS OF FACT AND QUESTIONS OF LAW ARE IRRELEVANT TO ARTICLE 15

To this point we have discussed the application and validity of article 15 upon successive assumptions as to whether the dispute between the parties raised a question of fact, a "mixed question" of fact and law, or a pure question of law. For many years the Government and contractors have litigated in the Court of Claims and in this Court whether provisions substantively similar to article 15 apply to questions of law.[19] Although this question has been determined in the Court of Claims (*McShain* v. *United States*, 88 C. Cls. 284, 297; *Callahan Walker* v. *United States*, 95 C. Cls. 314, 327), it has not been expressly decided in this Court. Cf. *United States* v. *McShain*, 308 U. S. 512, 520; *United States* v. *Callahan Walker*, 317 U. S. 56, 60–61. We believe, however, that the objectives and policy of the Standard Form con-

[19] See Government's Brief in *United States* v. *McShain*, 308 U. S. 512, No. 43, October Term, 1939, pp. 10–17; respondents brief, pp. 9–12; Government's brief in Court of Claims in same case, No. 43084, pp. 52–56; plaintiff's brief, pp. 37–39; Government's brief in *United States* v. *Callahan Walker*, 317 U. S. 56, No. 65, October Term, 1942, pp. 20–34; respondent's brief, pp. 13–15.

tract provision in question render largely irrelevant such distinctions as whether the issue is one of fact, one of law, or a mixture of the two.

The obvious purpose of a provision such as article 15, which is inserted in construction contracts and other agreements involving detailed or complex subject matter is to provide an expeditious and satisfactory method of adjusting the numerous differences which may arise during performance and to minimize litigation. *Kihlberg v. United States,* 97 U. S. 398, 401. To make the operation of such a provision depend upon the legal category to which a court may assign the question raised by a dispute is drastically to limit its effectiveness. Courts, text writers, and attorneys have always differed over whether particular questions are factual, legal, or a combination of both. See Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis* (1944) 58 Harv. L. Rev. 70, and authorities cited; Paul, *Dobson v. Commissioner: The Strange Ways of Law and Fact* (1944) 57 Harv. L. Rev. 753. Surely the contractor and the Government engineer should not be required to predict the decision which the court of last resort will reach as to the nature of a particular dispute, in order to forecast whether finality attaches to its administrative determination; nor should the matter be litigated in each instance. To import into government contract law as a mandatory re-

quirement, the categories which are employed in ascertaining the respective functions of juries and statutory administrative bodies and of courts would be both to conflict with the purpose of provisions such as article 15 and to introduce needless uncertainty into contractual affairs.

As we have shown (*supra*, pp. 30–31), the fact that the arbitrator chosen by the parties is a government officer has been held by this Court not to negative the validity of the stipulation. It should equally prove no bar to the construction for which we contend. Considerable safeguards attach to the decision of the head of a government department or agency, who is responsible to the Chief Executive and to the Congress, and the assumption must be that he will ordinarily decide controversies fairly and with due regard to the just rights of the contractor. Cf. *United States* v. *Blair*, 321 U. S. 730, 735. If in a given case there is a showing of partiality or bias, not only will the administrative findings not be accorded the stipulated finality (*United States* v. *Gleason*, 175 U. S. 588, 602), but compliance with the requirement that the dispute be submitted for administrative determination may be excused. *United States* v. *Blair*, *supra*, 736–737. Abuse may thus be prevented or overcome.

To impose restrictions, otherwise than by statute, upon the terms which may be embodied in government contracts with reference to the ad-

justment of disputes, would constitute a drastic departure from previously understood law and would largely defeat the purpose of expeditious disposition of claims. We contend, therefore, that article 15 should be given its plain meaning without introduction by judicial decision of the difficult distinctions between fact and law which have arisen in dissimilar contexts, here largely irrelevant.

III

THE GOVERNMENT DID NOT COMMIT A BREACH OF ITS CONTRACT WITH RESPONDENTS.

Contrary to the determination of the Administrator, the court below decided that the Government was responsible for the increase in respondents' wage rates and was liable for the excess cost. This decision was based upon two grounds: (1) that the Government had "in fact established different wage rates on [respondents'] job, and, therefore, it is obligated to pay the increase under article 19" of the contract (R. 36, the view of two of the three judges in the majority); and (2) that, in any event, the Government is liable for the increased wages because its action constituted a breach of an implied obligation not to render respondents' performance more expensive (R. 36–37, 40, the view of all three judges). If we are correct in our position that the administrative ruling to the contrary is

not subject to judicial review, the present inquiry is at an end. However, we submit that, irrespective of this consideration, the administrative determination was correct.

A. THE GOVERNMENT DID NOT ESTABLISH "DIFFERENT WAGE RATES" COMPENSABLE UNDER ARTICLE 19 (a)

Article 19 (a) of the contract (*infra*, p. 47) provided that the "wage rates established in the Specification shall be subject to change by the Federal Emergency Administration of Public Works", and that in "the event" the Administration "establishes different wage rates, the contract price shall be adjusted accordingly." The specifications (*infra*, pp. 48–49) set forth minimum wage rates for the different classes of employees and provided that those rates should be subject to review and adjustment by the Administrator, as provided in article 19 (a) of the contract; but it expressly stated that "The Government will not consider any claims for additional compensation made by the Contractor because of payment by the Contractor of any wage rate in excess of the applicable rate contained herein. All disputes in regard to the payment of wages in excess of those specified herein shall be adjusted by the Contractor". Finding that the Government "did not at any time expressly request [respondents] to pay higher wages" (Fdg. 12, R. 27), two members of the

court below nevertheless held that the Government "in fact" had "established different wage rates on [respondents'] job" since payment of the higher wages by respondents "was the necessary consequence" of the Government's prescription of higher minimum wages in its invitation for bids for the superstructures (R. 36). This inference, we submit, disregarded the applicable provisions of the contract and specifications and could not properly be drawn from the record.

It is well known that, as the court below stated (R. 35), the purpose of the Public Works program, as part of which the instant contract was negotiated, was to relieve the wide-spread unemployment prevailing during the depression of the 1930's. The requirement in Public Works contracts for the payment of minimum wage rates [20] was imposed to protect workers by assuring that they would receive wages sufficient for a decent standard of living. To take care of possible fluctuations in the cost of living during the performance of these contracts, article 19 of the standard form provided that the wage rates fixed in the specifications were subject to change by the Government, with an adjustment of the contract price

[20] It is not questioned that the wage rates fixed in the specifications were minimum wages only. The Instructions to Bidders specifically stated that respondents should pay their employees "not less than the hourly wage rate" for each occupation listed (Fdg. 5, R. 23).

if higher rates were established. "Its manifest purpose was to protect labor so that in the event changing conditions made it advisable [the Administrator] might increase the minimum requirements in order that labor should be assured a proper wage." *Le Veque* v. *United States*, 96 C. Cls. 250, 253.

There was no establishment of higher wages under article 19 of the contract unless the Government could have required respondents to pay their employees the higher rates fixed for the superstructures. The only way that such a requirement could have been imposed would have been by an explicit change of the rates fixed by the specifications, and no such change was made. The respondents, correlatively, were not entitled to increased compensation under article 19. The rights of the parties were fixed by paragraph 4 of section 12 of the specifications, *infra*, p. 49, which expressly notified the contractor that he would not be reimbursed for wage increases in the absence of a corresponding increase in the rates fixed in the specifications, and that all wage disputes would have to be "adjusted" by him. In the face of this provision, respondents clearly cannot now recover pursuant to the contract's express provisions.

B. THE GOVERNMENT DID NOT VIOLATE AN IMPLIED CONDITION OF THE CONTRACT

Invoking the rule that "it is an implied condition of every contract that neither party will hinder the other in his discharge of the obligations imposed upon him, nor increase his cost of performance,"[21] the court below held that by inviting bids for the superstructure at minimum wage rates higher than those set forth in respondents' contract, the Government violated its duty[22] (R. 36–37). The application of this rule of law to the present case assumes that the Government caused the wage increase. The Government's action, however, did not create a situation in which workers were called upon to work on the same project at

[21] An example of the rule and of the limitation upon it is stated as follows: A contracts to sell and B to buy in the future a large quantity of Georgia pine. Before the time for performance, B makes large purchases of Georgia pine from other parties, thereby making it more difficult for A to fulfill his contract. B has not committed a breach of contract. Risk of such hindrance as has occurred was assumed by A. If B's purpose in making other purchases was to corner the market, or otherwise hinder performance in ways or for purposes not within the risk assumed, he would have committed a breach. American Law Institute, *Restatement of Contracts*, § 315, illustration 3.

[22] Granted that the rule is correct, the court below disregarded the obvious limitation upon it, that it has no application where the terms of the contract or the surrounding circumstances are such as to show that the risk of increased cost of performance was assumed or anticipated by the parties. *Restatement of Contracts*, § 315 (1) (b); Williston, *Contracts* (rev. ed.) § 1293A; *Iron Trade Products Co. v. Wilkoff*, 272 Pa. 172, 116 Atl. 150.

the same time at different rates of wages. The Building Trade Employers' Association of Chicago, of which respondents were a member (R. 22), had an agreement with the construction unions in Chicago for the same minimum wage rates as those specified in respondents' contract. This agreement was in effect when the contract was made and was not to expire until May 31, 1936, three months after the job was originally scheduled to be finished and 12 days after it was actually completed (Fdg. 18, 19; R. 31–34).[23] It was necessary that the Government call for bids and enter into a contract for the superstructures in advance, so that work upon them could commence without delay immediately after respondents completed the foundations; but the increased wage rates specified therein were not to take effect until after respondents' contract was completed. There was no conflict between the two sets of wage rates and no hint that the Government desired or intended to bring about increased labor costs on the respondents' job. It would normally and reasonably be expected that the union would adhere to its agreement until its expiration. The union struck, however; and, as Judge Littleton

[23] This also appears from respondents' brief in the court below which states (p. 57): "The record is conclusive that the rates provided for in the specification of the foundations were the rates prevailing in Chicago at the time, and that these rates remained in force on work other than P. W. A. projects until May 31, 1936."

stated in his dissent, the increase in wages came about as "a direct result" of the employees' demand and the strike. (R. 43.) The increase was not a "necessary consequence" of the Government's specification of higher wages upon the superstructures. In the words of the dissenting judge (R. 43):

> The fact that the labor unions of the Chicago territory may have failed to abide by their wage agreement with the Building Trade Employers' Association, * * * cannot be made the basis of a claim for reimbursement against the Government.[24]

Certainly it cannot be contended that the Government was under a general duty not to fix dif-

[24] Respondents, in their brief in opposition to the petition for a writ of certiorari (pp. 19–20), argue that the "sole reason" for the statement of the head of the department "that the government did not increase the wages the respondents were required to pay was based upon his *opinion* that the rates provided for by the agreement between the Building Trade Employers' Association and the Unions of the City of Chicago terminated on January 1, 1936, and that thereafter higher rates were to be established. * * * The only evidence in the case is that the agreement did not terminate until May 31, 1936, long after the contract was originally due for completion, and that the scale of wages announced for the superstructures was higher than the scale prevailing on private jobs." The fact that the head of the department incorrectly concluded that the agreement expired January 1, 1936, is not significant. Under the agreement actually in effect, respondents were more largely protected against a rise in wages than the Administrator supposed, and the employees' response to the Government's announcement was correspondingly more unusual.

ferent wages on the superstructures from those prescribed for the earlier work on the foundations. The very purpose of the project, as well as the inevitable need of adjustment to changing circumstances, would be inconsistent with such an obligation. Cf. *Le Veque* v. *United States*, 96 C. Cls. 250; *Dravo Corp.* v. *United States*, 93 C. Cls. 734, 758. There is nothing in the present contract or in the surrounding circumstances which gave rise to an obligation to freeze wages on Public Works projects in the vicinity, or even on later stages of the same building, at the level fixed for respondents. Article 19 and the provisions of the specifications discussed above (pp. 36–37), in dealing expressly with the subject of increased wages, exclude the implication of reimbursement for higher wages established in any other manner and clearly place upon the contractor the risk of changes which occur because of general market forces, whether or not the Government is a factor in the market, so long as the Government proceeds legitimately. A privilege, analogous to that of the trader who causes loss to another in the legitimate pursuit of business, may well be said to attach to the acts of the Government here. Cf. American Law Institute, *Restatement of Torts*, §§ 10, 708, 709; *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, 479; *supra*, p. 39, n. 21.

It may be conceded that the Government's act of specifying higher wages in calling for bids for

the superstructures was in one sense a factor in bringing about the situation which caused higher wages to be paid by respondents.[25] It does not follow, however, that the "legal cause" of the higher wages was the Government's action. For such cause to arise it is necessary that "the law regard * * * it [as] just to hold" the actor responsible. American Law Institute, *Restatement of Torts*, § 9. Cf. Green, *Judge and Jury* (1930), pp. 196–222. Aside from justification afforded by the public purposes which, as has just been noted, the Government undertook to serve, the action of the employees and the union in striking for higher wages introduced an intervening factor which broke the chain of legal causation between the Government's act and the added cost to the respondents. American Law Institute, *Restatement, supra* §§ 440, 441, 448; Harper, *Torts* (1933), §§ 124, 128. The existence of a union wage agreement supposed to remain in effect until May 31, 1936, deprives the strike for higher wages of that reasonable foreseeability of consequences which is requisite to found a recovery of damages for breach of contract. See American Law Institute, *Restatement of Contracts*, § 330.

[25] The court below put the matter in "but for" form by stating that the workers would not have struck except for the Government's action. (R. 36.)

CONCLUSION

For the reasons stated we respectfully submit that the judgment below is erroneous and should be reversed.

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JANUARY 1945

APPENDIX

CONTRACT PROVISIONS

ART. 3. *Changes.*—The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this Contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this Contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than $500 shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered, unless the Contracting Officer shall for proper cause extend such time, and if the parties cannot agree upon the adjustment the dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the Contractor from proceeding with the prosecution of the work so changed.

* * * * * * *

ART. 15. *Disputes.*—All labor issues arising under this contract which cannot be satisfactorily adjusted by the Contracting Officer shall be submitted to the Head of the Department. Except as

otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the Contracting Officer or his duly authorized representative, subject to written appeal by the Contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the Contractor shall diligently proceed with the work as directed.

* * * * * *

ART. 18. *Wages.*—(a) There shall be paid each employee engaged on the project in the trade or occupations listed in the Specification, the hourly, weekly, or monthly wage prescribed for the same in the Specification. If, after the award of this contract, it becomes necessary to employ any person in a trade or occupation not listed in the Specification, such person shall be paid an hourly, weekly, or monthly rate of wage fairly comparable to the rates contained in the Specification as shall be approved by the head of the department and such wage rates shall be retroactive to the time of the initial employment of such person in such trade or occupancy.

(b) A clearly legible statement of all wage rates to be paid the several classes of labor employed on the work shall be posted in a prominent and easily accessible place at the site of the work, and the Contractor shall keep a true and accurate record of the hours worked by and the wages paid to each employee, and shall furnish the Contracting Officer with a sworn statement thereof on demand.

All employees shall be paid in full not less often than once each week and in lawful money of the United States in the full amount accrued to each individual at the time of closing of the pay roll, which shall be at the latest date practicable prior to the date of payment, and there shall be no deductions or rebates on account of goods purchased, rent, or other obligations, but such obligations shall be subject to collection only by legal process.

ART. 19. (a) The wage rates established in the Specification shall be subject to change by the Federal Emergency Administration of Public Works. In the event that the Federal Emergency Administration of Public Works establishes different wage rates, the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the Contractor, whether under this contract or any subcontract.

(b) The Contractor and each subcontractor shall prepare the pay rolls upon forms to be prescribed and in accordance with instructions to be furnished by the Works Progress Administration. Not later than the third day following the payment of wages, a certified legible copy of each pay roll, whether paid by the Contractor or any subcontractor, shall be transmitted by the Contractor to such office as may be designated by the Works Progress Administration. The Contractor and each subcontractor shall submit reports at such times and on such forms as may be required by the Works Progress Administration, covering purchases of, and requisitions for, materials, together with such other information as may be required to determine the progress and status of the completion of the work on the project.

(c) The Contractor and each subcontractor shall report to the United States Department of Labor monthly within 5 days after the close of each calendar month, upon forms to be prescribed and in accordance with instructions to be furnished, by the United States Department of Labor, covering the number of persons on their respective pay rolls directly connected with the project, the aggregate amount of such pay rolls and man-hours work, and an itemized statement of the total expenditures for materials. The Contractor shall also furnish to the United States Department of Labor the names and addresses of all subcontractors on the work at the earliest date practicable.

(d) The Works Progress Administration through its authorized agents shall have the right to inspect all work as it progresses and shall have access to all pay rolls, records of personnel, invoices of materials, and any and all other data relevant to the performance of this contract."

SPECIFICATIONS

Paragraph 1 of Section 12 of Division I of the specifications provided that:

> Subject to the specification, general conditions and the contract, there shall be paid each Employee in the Trade or Occupation listed below not less than the hourly wage rate set opposite same. * * *

Carpenters	$1.3125
Cement finishers	1.3125
Hoisting engineers	1.3125
Common laborers	.85

Paragraph 2 of Section 12, *supra,* provided, that:

> The above wage rates are subject to review and adjustment by the Federal Emergency Administrator of Public Works, as provided in Article 19 (a) of the contract.

Paragraph 4 of Section 12, *supra,* provided that:

> The Government will not consider any claims for additional compensation made by the Contractor because of payment by the Contractor of any wage rate in excess of the applicable rate contained herein. All disputes in regard to the payment of wages in excess of those specified herein shall be adjusted by the Contractor.

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No. 431

In the Supreme Court of the United States

OCTOBER TERM, 1944

THE UNITED STATES, PETITIONER

v.

JOSEPH H. BEUTTAS, JOHN W. BEUTTAS, AND PAUL H. BEUTTAS, TRADING AS B. W CONSTRUCTION CO., NOT INC.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

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The respondents in their brief in this Court (pp. 7–11) contend that no decision upon the claim which is here in issue was ever made by the "head of the department" within the meaning of article 15 of their contract with the Government. The court below found, however, that respondents took a timely appeal to the head of the department from the contracting officer's denial of their claim (R. 26); that on June 29, 1936, the Assistant Administrator of Public Works "made written decisions and findings of fact with reference to the various items of the claim asserted by plaintiffs on appeal" and denied respondents'

claim for reimbursement for the higher wages paid by them (R. 29);[1] that on February 12, 1937, respondents addressed a letter to the Administrator petitioning him "to make a decision on the various items of the claim" which had been considered "by the Assistant Administrator" (R. 31); and that on May 20, 1937, the Federal Emergency Administrator of Public Works "after considering * * * [respondents'] appeal to him" made "findings of fact, conclusions, and recommendations on the various items of [respondents'] claim" (R. 31). Further, the court below in its opinion accepted the view that the "contracting officer and head of the department" had rendered a decision under article 15 of the contract (R. 37) and proceeded to consider the propriety of according finality to "this decision". We submit that these findings of the Court of Claims are conclusive.

If is true that in the court below the Government made the alternative contentions that no decision had been rendered by the head of the department, and that the findings of the head of the department, if deemed to be a decision, did not aid the claimant. The Court of Claims accepted the view that a decision had been rendered by the head of the department. In this Court the

[1] As defined in article 28 of the contract here in question, "Head of Department" means the Federal Emergency Administrator of Public Works, and "his representative" means any person authorized to act for him (R. 20).

Government has accepted the view taken by the court below.

The record does not contain an entirely consistent terminology in regard to the nature of the several decisions which were rendered upon respondents' claim. The decision of the contracting officer is referred to as "final Change Order No. 1", first issued by the Director of Housing on April 17, 1936 and "revised and reissued" by the Assistant Administrator of Public Works on June 25 of that year (R. 28). The decision rendered by the Assistant Administrator of Public Works on June 29, 1936, is referred to as "decisions and findings of fact * * * on appeal" (R. 29). The decision of the Federal Emergency Administrator of Public Works, "after considering plaintiffs' appeal to him", is referred to as "findings of fact, conclusions, and recommendations * * * in a letter addressed to the Comptroller General" (R. 31). Judge Littleton's dissenting opinion refers to the decision of the Assistant Administrator of Public Works as that of the head of the department by his authorized representative and, accordingly, regards this decision as the final one under article 15 (R. 44–45).

These several characterizations of the various administrative decisions do not give rise to confusion, however, if the evident intent of the findings of the Court of Claims is followed. There were, in this view, three successive administrative decisions, the third of which, made by the head of

the department pursuant to respondents' original appeal and subsequent letter to him, was more favorable to the respondents than the other two. See the Government's principal brief, pp. 5–7.

Notwithstanding the form of the decision of the head of the department, it was conclusive under the contract and binding upon the Comptroller General. *United States* v. *Mason & Hanger Co.*, 260 U. S. 323, 326; *Fred R. Comb Co.* v. *United States*, 100 C. Cls. 240, 247; *McShain Co.* v. *United States*, 83 C. Cls. 405, 409–410. Cf. *Globe Indemnity Co.*, v. *United States*, 291 U. S. 476, 478, 483.

Respectfully submitted,

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FEBRUARY 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES.

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November 8, 1944.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS OF THE UNITED STATES.

STATEMENT.

The petitioner seeks a review of that part of a decision of the Court of Claims of the United States which awarded the respondents a judgment of $4,660.83 for increased wages.

The statement, as outlined by the petitioner, by reason of the fact that it emphasizes only certain phases of the case supporting its theory and leaves out among other

things the part thereof which had particularly to do with the ruling on the question involved herein, we venture to restate:

The respondents entered into a contract with the petitioner November 26, 1935 for the construction of the foundations of the Jane Addams Houses in Chicago, Illinois, for the consideration of $104,890.00, the contract providing that the work was to be completed within seventy-five calendar days after receipt of notice. (Fdg. 2)

On November 21, 1935 the District Manager of the Housing Division of Public Works Administration at Chicago wrote the respondents in part as follows:

> "With this information at hand please arrange to proceed with the work under your contract for foundations for Jane Addams Houses, Project H-1405, as outlined in the plans and specifications.",

and the respondents, in accordance therewith, did proceed with the work in accordance with this direction of November 21. (Fdg. 8)

On December 10, 1935 the contracting officer, due to changes that were being made by him, ordered the respondents to suspend all work until further notice, and the work was suspended and held up by the contracting officer until February 17, 1936 but, due to weather conditions at that time, respondents were unable to proceed until February 26, 1936. (Fdg. 9)

The specifications provided the hourly wage rates which were to be paid, and stated,

> "The above wage rates are subject to review and adjustment by the Federal Emergency Administrator of Public Works, as provided in Article 19(a) of the contract."

and Article 19 of the contract provided:

> "The wage rates established in the specifications shall be subject to change by the Federal Emergency Administrator of public works. In the even that the Federal

Emergency Administrator of Public Works establishes different wage rates the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the contractor, whether under this contract or any subcontract." (Fdg. 5)

On December 28, 1935 respondents received a report from their superintendent on the project based on information obtained by him that the Federal Emergency Administrator of Public Works was about to change the scale of wages for carpenters and laborers on PWA projects. At that time the government had not issued invitations for bids and specifications for the project covering the superstructures of the Jane Addams Houses, the foundations of which were covered by the respondents' contract. The government specifications and invitations for bids for such superstructures were issued February 15, 1936, which set forth a scale of wages applicable to the superstructures in excess of those set forth for the foundations covered by the respondents' contract. (Fdg. 12)

At the commencement of their work respondents began paying the rate of wages set forth in their contract and continued to pay such wages until sometime in February or March, 1936. Respondents' force was unionized and, because they were not paying the wage scale provided in the invitation and specifications for the superstructures, the union called a strike and thereby enforced payment by respondents of the wage scale provided in the project for the superstructures and demanded payment on the increased scale retroactive to January 8, 1936, which was paid by the respondents. (Fdg. 12)

The scale of wages announced in the invitation for bids and specifications for the superstructures was higher than the scale prevailing in the territory at that time on private jobs, and the difference paid by the respondents between the two scales amounted to $4,321.00. (Fdg. 13).

A dispute arose between the petitioner and respondents as to reimbursement for the additional wages paid over and

above those set forth in the invitation for bids and the contract, the respondents contending that the petitioner had established higher wages on the project and that they were entitled to be reimbursed such increase as an added cost. The final change order No. 1 covering the foundations was revised and reissued by the Assistant Administrator on June 25, 1936 after the respondents' work had been substantially completed and did not include the wage increase in dispute, but reserved to the respondents their right to prosecute their claim. (Fdg. 14)

The respondents appealed to the Assistant Administrator of Public Works, who rendered a decision on June 29, 1936 and with reference to the claim for increased wages decided that the respondents were entitled to $909.00 but that the payment thereof was dependent upon the opinion of the General Accounting Office and should be submitted to it. (Fdg. 16)

On February 12, 1937 the respondents appealed to the Federal Emergency Administrator of Public Works, the head of the Department, and petitioned him for a decision of their claim. (Fdg. 17)

On May 20, 1937 the Hon. Harold L. Ickes, Federal Emergency Administrator of Public Works, after considering the respondents' appeal, addressed a letter to the Comptroller General, in which he denied the respondents' claim for increased wages, except in the sum of $909.00. In his report to the General Accounting Office he stated in part as follows:

> "I *understand* that the minimum rates specified are in accordance with those set forth in an agreement entered into between the Building Trade Employers' Association and the Unions of the City of Chicago. I do not have at my disposal a copy of this agreement which I *understand* established the rate contractors were to pay as wages up to and including January 1, 1936. I *understand* that the contractor is a member of this Association and had in his possession a copy of the agreement with the Unions prior to the time of his

bidding. The Government had no way of knowing what minimum rates would be established after January 1, 1936, as the Unions and the Building Trade Employers' Association had not established the rates for the year 1936 at the time the foundation work was bid upon. . . . Furthermore, *I am of the opinion* that the Contractors in the City of Chicago were advised by the Unions that on January 1, 1936, the wages in the old agreement would be cancelled and higher wages would be established after January 1, 1936." (Italics Supplied) (Fdg. 18)

The statement made in the above quoted letter that the labor rates of wages provided for by the agreement between the Building Trade Employers' Association and the Unions of the City of Chicago terminated January 1, 1936, and that thereafter higher rates were to be established, was an error. The agreement between the Building Trade Employers' Association and the Unions fixing rates of wages did not expire until May 31, 1936. (Fdg. 19)

Three of the four judges hearing the case decided that all of the proof showed that the laborers would not have struck except for the government's action in establishing a higher minimum wage on the *very same building* on which the respondents' laborers were employed, and that the petitioner must have known that this would be the necessary consequence of its act, and further held that under Article 15 the parties did not agree in advance of any dispute to waive their right to sue for breach of the contract and to leave the final determination of any controversy to the decision to one of the contracting parties.

QUESTIONS PRESENTED.

1.

Whether Article 15 of a Standard Form Government Contract which provides that the decision of the head of the department on "all disputes concerning questions arising" under the contract shall be final and conclusive upon the parties, applies to a finding by the head of the department that the contractor's payment of higher wages than those specified in the contract were not caused by acts of the government.

The petition states "The Administrator found that not the acts of the government, but the signing of a new agreement with the union was the cause of the wage increase" (P. 9), and argues that because the Administrator made such a finding, notwithstanding the fact that the evidence in the case shows that by his own statement he admits he did not have a copy of such an agreement and that all of his statements were based upon his *understanding*, which the evidence shows was in error, that the Court of Claims cannot decide the case on the true facts but is bound to follow the admitted erroneous finding of the Administrator.

It is clear in the present case that the finding of the Administrator was erroneous and not based upon the true facts. The Court of Claims found, as a matter of fact (Finding 19), that the statement of the Administrator in his letter of May 20, 1937, and upon which he based his decision, was an error, and therefore the Court of Claims had the right to decide the case upon the undisputed true facts as shown in the Court's findings.

A case very similar to the present case is that of *United States* v. *Wharton, Green & Co., Inc.*, 303 U. S. 661, Writ of Certiorari denied April 4, 1938. That was a case which originated in the Court of Claims and involved a construction contract. The contract contained the usual Article 9 concerning delays and provided that the contracting officer

should ascertain the facts and extent and cause of delays and that his findings of fact shall be "final and conclusive." The contracting officer found the contractor chargeable for 194.5 days' delay. The Court of Claims found that the decision of the contracting officer was erroneous and gave judgment in favor of the contractor.

The government filed its petition for writ of certiorari to this Court and therein stated that the question involved was "Whether the Court of Claims, without proof of fraud or such gross error or negligence as will imply bad faith, may review and redetermine finding of fact where a contract provides that a decision of the contracting officer as to the facts shall be final and conclusive on the parties, subject only to appeal to the head of the department concerned within thirty days." One of the specifications of error was "In going behind the findings of a contracting officer without proof of fraud or such gross negligence as to imply bad faith." This Court denied the petition for writ of certiorari.

A fair and natural interpretation of Article 15 is that it really relates to questions of fact and does not repose in the head of the department the absolute right to make decisions on questions of law, such as, whether or not there has been a breach of a contract, as to hold otherwise would leave solely to the party who may have breached the contract the right to decide whether or not it had breached it.

The Court of Claims, in deciding against the petitioner's contention, recognized that it was not uncommon in construction contracts for parties to agree that the decision of the architect or engineer shall be final on certain questions and referred to the very cases now cited by the petitioner, but pointed out that provisions leaving to the final judgment of the engineer or architect the question of whether or not there has been a breach of the contract and, preventing resort to the Courts, have never been upheld.

Analysis of Authorities Relied Upon by Petitioner.

Petitioner cites various decisions by this Court and claims that the present decision of the Court of Claims is in conflict therewith, and thus bases its reason for claiming that the writ of certiorari should be granted.

An examination of the decisions cited will disclose that the present decision of the Court of Claims is not in conflict therewith and, therefore, there is no grounds for granting the present petition for writ of certiorari.

Bailey v. Central Vermont Ry., 309 U. S. 350, 354.

This case is clearly not in point, as what was decided by this Court was that in a suit under the Federal Employers' Liability Act there was sufficient evidence to go to the jury as to whether or not the defendant was negligent in failing to use reasonable care in furnishing the plaintiff with a safe place to work.

Tennant v. Peoria & P. U. Ry., 321 U. S. 29, 34-35.

This case, like the previous one, was a suit under the Federal Employers' Liability Act, and the question involved was whether the negligence of the defendant was the proximate cause of the death, and what this Court decided was that it was not the function of a Court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on the theory that the proof gives equal support to inconsistent and uncertain inferences.

Milwaukee & St. P. Ry. v. Kellogg, 94 U. S. 469.

This was a suit for compensation for destruction by fire of the plaintiff's sawmill. The question involved was whether or not the fire which originated upon the defendant's steamboat was proximate cause of the destruction of the plaintiff's sawmill. The defendant requested an instruction that the injury sustained by the plaintiff was too remote from the negligence of the defendant to afford a ground for recovery, which instruction was denied, and the

question was left to the jury. This Court, in deciding in favor of the plaintiff, held that the true rule is that what is the proximate cause of an injury is ordinarily a question for the jury.

Kihlberg v. *United States*, 97 U. S. 398.

This suit involved a contract between the parties for the transportation of government stores and supplies, the contract providing that payment was to be made in all cases according to the distance from the place of departure to that of delivery, and that the Chief Quartermaster was to fix the distances which should govern in the settlement of the contractor's accounts for transportation. This Court decided that under the circumstances in that case there was no inference that the Chief Quartermaster did not exercise the authority given him with an honest purpose to carry out the real intention of the parties, and stated in part as follows:

> "The difference between his estimate of distances and the distances by air line or by the road usually traveled is not so material as to justify the inference that he did not exercise the authority given him with an honest purpose to carry out the real intention of the parties as collected from their agreement."

Martinsburg & Potomac R. R. Co. v. *March*, 114 U. S. 549, 553-554.

This was a suit to recover a balance claimed to be due plaintiff on a contract for grading and masonry on a section of a railroad contract, which provided among other things that whenever the contract shall be completely performed on the part of the contractor and the defendant's engineer shall certify the same in writing, together with his estimates, the company shall within thirty days after receipt of such certificate pay to the contractor the amount due. The declaration contained a copy of the contract but did not contain an allegation that the engineer had ever

certified in writing the complete performance of the contract, together with an estimate of the work and the amount of compensation due the contractor according to the prices established by the parties. The defendant demurred to the declaration, which was overruled. This Court held that the demurrer should have been sustained for the reason that the parties had agreed that the certificate of the company's engineer was necessary and there was no allegation that the engineer had been guilty of fraud or such gross mistake as to imply bad faith, or had failed to exercise honest judgment in discharging his duties. The declaration did not state facts entitling the plaintiff to sue the company in the absence of such a certificate.

Plumley v. *United States*, 226 U. S. 545-547.

This was a suit by a contractor for extra work and damages for delay. The contract provided that if there was any discrepancy between the plans and specifications or between the contract of McLaughlin (previous contractor) and the contractor, Plumley, the matter should be referred to the Secretary, the plaintiff agreeing to abide by his decision in the premises. The Secretary decided against him and this Court held that under the circumstances his construction was binding on the contractor.

Merrill-Ruckgaber Co. v. *United States*, 241 U. S. 387.

This was a suit by a contractor for extra work, the contract providing that the decision of the Supervising Architect as to the proper interpretations of the drawings and specifications should be final. There was a disagreement between the parties and the contractor applied to the Secretary of the Treasury, who confirmed the action of the Architect. This Court, in deciding in favor of the government, held that there was no intimation of unfairness on the part of the Supervising Architect and that there was no attempt to impugn the good faith of the Secretary of the Treasury who sustained the decision of the Architect.

and that the contract explicitly provided that the decision of the Supervising Architect as to the proper interpretation of the drawings and specifications would be final.

Goltra v. *Weeks*, 271 U. S. 536.

This was a suit by the plaintiff to enjoin seizure of a fleet of tow-boats and barges which had been held by him as lessee. He charged a conspiracy to unlawfully deprive him of the boats. The Secretary of War had notified the lessee that in his judgment the lessee had not complied with the terms and conditions of the contract in that he failed to operate the boats as a common carrier and in other particulars and declared the contract terminated. The contract provided that the government reserved the right to make certain inspections and that non-compliance in his judgment with any of the terms and conditions of the lease would justify the termination of the lease. The evidence showed that from the time the plaintiffs got the boats they were not in use but were tied up except for the transportation of two small cargoes, and the bill of complaint admitted that the plaintiff had not fulfilled his covenant to operate as a common carrier. The plaintiff was given notice on March 4 of the termination and answered on March 8, but he tendered no facts upon which either the Secretary or Chief of Engineers could have any different conclusion from that already reached from the failure of the plaintiff to fulfill his obligation. Under the circumstances this Court dissolved the injunction.

United States v. *McShain*, 308 U. S. 512.

In this case a dispute arose between the contractor and the contracting officer with respect to the proper interpretation of the plans and specifications. The Court of Claims decided in favor of the contractor, and the question presented by the petition for writ of certiorari was as follows:

> "Whether the Court of Claims properly disregarded the decision of certain governmental officers upon the *interpretation of the plans and specifications*, when the

> Court made no finding of gross error sufficient to imply bad faith." (Italics supplied)

This Court granted certiorari and in a Per curiam decision reversed the Court of Claims.

Ripley v. *United States*, 223 U. S. 695.

This was a suit by a contractor for damages sustained by carrying out a contract to build a jetty. The contract provided that certain blocks should be laid on the jetty as the work progressed and when in the judgment of the United States Agent in Charge the case or mound had sufficiently consolidated. The Agent refused to permit the contractor to lay the blocks at certain times, causing the contractor additional costs. This Court, in the course of its opinion, stated among other things as follows:

> "No matter how long the delay or how great the damage, he was entitled to no relief unless it appeared that the refusal was the result of 'fraud or of such gross mistake as would imply bad faith' (citing cases).
>
> But the very extent of the power and the conclusive character of his decision raised a corresponding duty that the agent's judgment should be exercised—not capriciously or fraudulently, but reasonably and with due regard to the rights of both of the contracting parties. The finding by the Court that the inspector's refusal was a gross mistake and an act of bad faith necessarily, therefore leads to the conclusion that the contractor was entitled to recover the damages caused thereby."

Sweeney v. *United States*, 109 U. S. 618.

This was a suit to recover the costs of a wall built around the National Cemetery at Fort Harrison, Virginia. The contract contained a provision that a representative of the government would be designated to inspect the wall, and after such representative should certify that the wall was in all respects as contracted for it should be received and become the property of the United States.

The representative of the government reported that the wall had been constructed without paying any attention whatever to the instructions given relative to material, nor to the orders given with regard to the gate-posts. That the condemned material was used and that he considered the workmanship unsatisfactory. As a result of the foregoing report the wall was taken down and a new one constructed in its place. No representative of the government ever certified that the wall constructed was in all respects as contracted for by the claimant or in any respect as contracted for. This Court held that the claimant could not recover for the reason that the government representative expressly refused to give the necessary certificate on the grounds that neither the material nor workmanship was such as the contract required, and that there was no showing of any fraud, nor such gross mistake as would imply bad faith, nor any failure to exercise honest judgment, and that the claimant had been notified of the defective character of the material and that it would not be accepted before he put it into the wall.

It will be seen from the foregoing that the decision of the Court of Claims in the present case is not in conflict with the decisions of this Court and that the first question presented does not justify the granting of a writ of certiorari.

2.

Whether if Article 15 of the contract was intended to apply, it could validly be agreed to by the parties.

In the event this Court decides that the first question advanced by the petitioner does not justify granting writ of certiorari, then there is no need of considering the second question presented.

Assuming for the time being that Article 15 of the contract does give the head of the department the absolute right to decide all disputes concerning questions arising under the contract, whether factual or legal, whether either

party has breached the contract, in other words, from the very day the contract was signed, foreclosing contractor's right to resort to the Courts created for that purpose, to decide questions of law and whether there has been a breach of the contract by the petitioner, it is clear that such an agreement could not be validly entered into by the parties.

The petitioner argues that a claimant is free to resort to the courts, the only effect of such a stipulation being to *narrow* the field of judicial inquiry. If the petitioner's contention is correct, that the decision of the head of the department on *all* disputes concerning questions arising under the contract is final and conclusive, and binding upon the parties, then the field of judicial inquiry is not narrowed, but entirely eliminated.

No extended argument is believed necessary on this question other than to point out, as the Court of Claims did in its decision, that in the Act of Congress of February 24, 1855 creating the Court of Claims, Judicial Code, Sec. 145 (28 U. S. C. 250) it was stated,

> "* * * the said Court shall hear and determine all claims founded upon * * * any contract, express or implied, with the Government of the United States * * *."

If the petitioner's contention is correct then the right given by the Act of Congress to sue in the Court of Claims is taken away. A provision in a contract which gives to one of the parties the absolute right to determine all questions which may arise, and takes away from the other party any and all rights to question the correctness of the decision of the other party on all questions, is clearly void.

Insurance Co. v. *Morse*, 20 Wall. 445, 450, et seq.; *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535, 537; *Guaranty Trust Co.* v. *Green Cove R. R.*, 139 U. S. 137, 142; *Martin* v. *B. & O. R. R.*, 151 U. S. 673, 684; *Terral* v. *Burke Construction Co.*, 257 U. S. 529. And in the present instance contrary to the law established by Congress in creating the Court of Claims to hear and determine claims founded upon contracts with the government.

The petitioner cites no cases by this Court or any other Court holding that such a contract would be valid and binding.

Most of the decisions referred to by the petitioner under this question are also referred to under the first question and as we have already analyzed them, no purpose would be served in repeating what we have said heretofore. The additional decisions referred to are the following:

Analysis of Authorities Relied Upon by Petitioner.

United States v. *Gleason*, 175 U. S. 588.

This case involved a contract which contained a provision that if the contractor should by freshets, ice or other force or violence of the elements and by no fault of his own be prevented from commencing or completing the work or delivering the material at the time agreed upon in the contract, such additional time "may" in writing be allowed the contractor for such commencement or completion as in the judgment of the contracting officer or his successor shall be just and reasonable. The Court below construed the foregoing word "shall" instead of "may". This Court disagreed with the lower Court and decided that so long as the engineer was not guilty of bad faith or of mistake or negligence so gross as to justify inference of bad faith, the judgment of the engineer was final.

United States v. *Blair*, 321 U. S. 730.

This case arose out of a government contract, and part of the claim was for costs of delay occasioned by another contractor on the same project. The contractor had 420 days to do the work but had planned to do it in 314 days and did finish it within the 420 days allowed by the contract. The contractor claimed that he was entitled to his increased costs because it had taken him the full 420 days instead of the 314 days within which he had planned to do the work. This Court held that there was nothing in the government

contract which imposed an obligation or duty on the government to aid the contractor in completing his contract prior to the stipulated completion date and that it was error for the Court of Claims to award damages to the contractor based upon the breach of a non-existent obligation.

The contractor had not availed himself of the appeal provisions of the contract found in Article 15, and this Court further held that said appeal provisions must be exhausted before relief is sought in the Courts as there was no finding or evidence that appeal to the head of an appropriate department would have been futile or prejudicial.

United States v. *Mason & Hagner*, 260 U. S. 323.

This case involved a "cost plus contract" and provided that the contractor should be reimbursed for all expenditures as should be approved by the contracting officer. The item in dispute was for premiums, the War Department having decided that it was a proper charge against the contract, while the Comptroller of the Treasury Department had disallowed the item. This Court held that as the War Department had approved the item, as it had a right to do under the contract, the Comptroller of the Treasury had no power over the decision of the War Department, which was exercised in accordance with the terms of the contract.

Bayne v. *Morris*, 1 Wall. 97.

The parties to this case, having certain differences, agreed to refer the matter to arbitrators who were authorized, in addition to determining the amount to be paid, to fix the terms as to time and security for any payment that should be awarded. An award was made on behalf of Morris, and they directed that the amount should be paid on certain dates and a bond should be given to secure the payments. No bond was given and suit was filed, before any of the amounts of the award became due. The Court below held that if suit were brought before any of the sums were due, plaintiff could not recover. This Court reversed

the lower Court and held that as the parties had submitted the matter to arbitrators, they were bound by the terms of the arbitration and when Bayne failed to deliver the bond for security Morris had a right to sue at once.

Burchell v. *Marsh*, 17 How. 344.

This case involved a bill in equity to set aside an award of arbitration as fraudulent and void. The answer denied the arbitrators acted unjustly but on the contrary acted justly, fairly and with due consideration for the rights of the parties. The matter was submitted on bill and answer. The lower Court set the award aside. This Court reversed the lower Court, stating that they were of the opinion that the record furnished no evidence of corruption or misbehavior in the arbitrators nor of ignorance as charged in the bill, or of any mistake which would justify the Court of Chancery in annulling it.

Gray v. *Powell*, 314 U. S. 402.

This was a suit by the Receiver of the Seaboard Air Line Ry. for an exemption of certain coal from Bituminous Coal Code on the ground that they were both producer and consumer of the coal. A hearing was had before the National Bituminous Coal Commission, which was later changed to the Bituminous Coal Division, and an order was entered denying exemption. Upon review there was a decree reversing the Director's order and this Court affirmed the decree below. The present decision was upon a petition for rehearing and this Court reviewed the conditions of the contract under which the coal was obtained by Seaboard as well as the various legislative enactments which sought to bring about a solution of the economic difficulties of the soft coal industry. The question involved was whether the Director's findings that Seaboard was not a producer of coal was to be sustained. This Court, after reviewing the Bituminous Coal Act and the provisions therein which provided for the determination by the commission and the review thereof by the Court, stated as follows:

"In a matter left specifically by Congress to the determination of an administrative body, as the question of exemption was here by §§ 4-II(1) and 4-A, the function of review placed upon the courts by § 6 (b) is fully performed when they determine that there has been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body, and an application of the statute in a just and reasoned manner."

Comb v. *United States*, 100 Court of Claims 240.

In this case, which involved a construction contract, the question involved was that of furnishing temporary heat. The contract provided that if there was no existing system to connect to, the contractor should supply sufficient heat by connecting up the boiler to be installed in the building or by other means approved by the Superintendent of Construction. The Superintendent of Construction refused to permit certain connections to be made. The contractor protested to the Commissioner of Indian Affairs, who sustained the Superintendent. Whereupon, the contractor applied to the head of the Department, who reversed the decision of the Superintendent and directed that a voucher be prepared to cover the costs incurred by the contractor. The Comptroller refused to pay on the ground that the decision of the contracting officer was final and conclusive. The Court of Claims held that the Comptrolier was wrong, as he gave no consideration to the contractor's right of appeal to the head of the Department.

We again submit that there is nothing in the foregoing decisions which is in any way contradictory to the decision of the Court of Claims or applicable to the present question, and granting a writ of certiorari is not justified.

3.

Whether the Government, in inviting bids for superstructures to be erected under separate and later contracts, specifying minimum wages which were higher than those fixed in respondents' contract for the foundations, thereby violated an implied obligation in respondents' contract.

Under this question the petitioner alleges that at the time the respondents entered into the contract the Building Trade Employers' Association of Chicago and the Unions of the City of Chicago had an agreement which fixed the same minimum rates as those provided in the contract and which was to expire on May 31, 1936, and then states that it was only shortly after that date that the respondents completed their work on the foundations and that of course the superstructures could not be erected until the foundations were completed, but that it was necessary that the contract for the superstructures be advertised and entered into in advance so that the work thereon could commence without delay after respondents had completed the foundation.

The foregoing statement by the petitioner might be of some importance were it not for the fact that while the contract was dated November 26, 1935, the respondents, by letter dated November 21, 1935, were requested to proceed with the work, and as the contract provided for its completion within 75 calendar days, in the normal course of events the contract would have been completed in the early part of February, 1936, prior to the time when the specifications were issued for the superstructures, in connection with which the higher rates of wages were established, but that due to changes made by the petitioner the respondents were ordered to stop work on December 10, 1935 and were not able to proceed until February 26, 1936, after the specifications for the superstructures had been issued. (February 15, 1936.)

Mr. Ickes' sole reason for stating that the government did not increase the wages the respondents were required to pay was based upon his *opinion* that the rates provided for by the agreement between the Building Trade Employers' Association and the Unions of the City of Chicago terminated on January 1, 1936, and that thereafter higher wages were to be established. Aside from the fact that Mr. Ickes was speculating in making such a statement, it was contrary to the facts. The only evidence in the case is that the agreement did not terminate until May 31, 1936, long after the contract was originally due for completion, and that the scale of wages announced for the superstructures was higher than the scale prevailing on private jobs.

The record is clear that whereas the government thought when the specifications for the foundations were issued that the fair wages were those set out in said specifications, by February 15, 1936, when but for the stoppage of work by the government the contract for the foundations would have been completed, conditions had changed to such an extent that the government no longer considered these fair wages and demanded that the contractor for the superstructures pay higher wages.

Except for preliminary work, respondents' work did not commence until after this change in the wage rate. The Court of Claims has found as a matter of fact that all the evidence showed that the laborers would not have struck except for the government's action in establishing a higher minimum wage on the very same building on which the respondents were employed, and further found as a matter of fact that the government did establish a higher wage rate on respondents' job and thereby was obligated to pay the increase.

Analysis of Authorities Relied Upon by Petitioner.

Petitioner cites two decisions of the Court of Claims in support of its contention, the first being *Le Veque, et al. v. United States*, 96 Court of Claims 250, in which case the

Court of Claims held that the establishment by the government of higher wages on another project in another part of the city did not require it to pay the increased wages upon the plaintiff's contract, and concluded that the increase in wages paid by the plaintiff in that case was not a necessary result of the government's act. The Court of Claims, in its decision in the present case, considered its decision in the Le Veque case, but pointed out that the facts in the present case were entirely different: that the increased wages in the present case were on the very same building on which the respondents were working; and concluded that in the present case the government did in fact establish higher wage rates on respondents' job.

The other case cited by the petitioner is *Dravo Corp.* v. *United States*, 93 Court of Claims 734. It is submitted that this case is not in point for the reason that the suit was brought under the Act of June 25, 1938, conferring jurisdiction upon the Court of Claims to hear and determine and enter judgment against the United States on behalf of contractors who had contracts with the United States and whose costs were increased as a result of the National Industrial Recovery Act. All the Court of Claims decided was that the plaintiff's increased costs were not the result of the National Industrial Recovery Act.

CONCLUSION.

It is respectfully submitted that the petition for writ of certiorari to bring before this Court the decision and judgment of the Court of Claims of the United States does not invoke questions of sufficient public importance to justify its consideration by this Court, and that the decision of the Court of Claims is correct and sound and the petition should be denied.

WILLIAM F. KELLY,
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Attorneys for Respondents.

BRIEF FOR RESPONDENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 431.

THE UNITED STATES, *Petitioner*,

v.

JOSEPH H. BEUTTAS, JOHN W. BEUTTAS, and PAUL H. BEUTTAS, Trading as B-W CONSTRUCTION CO., NOT INC., *Respondents*.

On Writ of Certiorari to the Court of Claims.

BRIEF FOR RESPONDENTS.

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BRIEF FOR RESPONDENTS.

Short Statement of the Case.

Respondents brought suit in the Court of Claims of the United States, to recover excess costs incurred by them as the result of delays caused by the pet[illegible]r incident to the construction of the foundations of the Jane Addams Houses in Chicago, Illinois, and increased labor costs.

Judgment in favor of Respondents in the amount of $13,388.27, consisting of $8,727.44 as stipulated and $4,660.83 as excess labor costs, was entered by the Court of Claims June 5th, 1944 (R. 45), and the petition of the Government for a writ of certiorari was granted by this Court November 20th, 1944 (R. 46).

Statement of Facts.

While we agree, with certain exceptions, with the statement of facts contained in the Petitioner's brief (Br. pp. 3-7), the essential facts will be here briefly stated for convenient reference.

The respondents entered into a contract with the petitioner November 26, 1935 for the construction of the foundations of the Jane Addams Houses in Chicago, Illinois, for the consideration of $104,890.00, the contract providing that the work was to be completed within seventy-five calendar days after receipt of notice. (Fdg. 2; R. 22)

On November 21, 1935 the District Manager of the Housing Division of Public Works Administration at Chicago wrote the respondents in part as follows:

> "With this information at hand please arrange to proceed with the work under your contract for foundations for Jane Addams Houses, Project H-1405, as outlined in the plans and specifications.",

and the respondents, in accordance therewith, did proceed with the work in accordance with this direction of November 21. (Fdg. 8; R. 24)

On December 10, 1935 the contracting officer, due to changes that were being made by him, ordered the respondents to suspend all work until further notice, and the work was suspended and held up by the contracting officer until February 17, 1936 but, due to weather conditions at that time, respondents were unable to proceed until February 26, 1936. (Fdg. 9; R. 25)

The specifications provided the hourly wage rates which were to be paid and stated,

> "The above wage rates are subject to review and adjustment by the Federal Emergency Administrator of Public Works, as provided in Article 19 (a) of the contract."

and Article 19 of the contract provided:

> "The wage rates established in the specifications shall be subject to change by the Federal Emergency Administrator of public works. In the event that the Federal Emergency Administrator of Public Works establishes different wage rates the contract price shall be adjusted accordingly on the basis of all actual labor costs on the project to the contractor, whether under this contract or any subcontract." (Fdg. 5; R. 24)

On December 28, 1935 respondents received a report from their superintendent on the project based on information obtained by him that the Federal Emergency Administrator of Public Works was about to change the scale of wages for carpenters and laborers on PWA projects. At that time the government had not issued invitations for bids and specifications for the project covering the superstructures of the Jane Addams Houses, the foundations of which were covered by the respondents' contract. The government specifications and invitations for bids for such superstructures were issued February 15, 1936, which set forth a scale of wages applicable to the superstructures in excess of those set forth for the foundations covered by the respondents' contract. (Fdg. 12; R. 27)

At the commencement of their work respondents began paying the rate of wages set forth in their contract and continued to pay such wages until sometime in February or March, 1936. Respondents' force was unionized and, because they were not paying the wage scale provided in the invitation and specifications for the superstructures, the union called a strike and thereby enforced payment by re-

spondents of the wage scale provided in the project for th superstructures and demanded payment on the increase scale retroactive to January 8, 1936, which was paid by th respondents. (Fdg. 12; R. 28)

The scale of wages announced in the invitation for bid and specifications for the superstructures was higher tha the scale prevailing in the territory at that time on privat jobs, and the difference paid by the respondents betwee the two scales amounted to $4,321.00. (Fdg. 13; R. 28)

A dispute arose between the petitioner and respondent as to reimbursement for the additional wages paid over an above those set forth in the invitation for bids and the con tract, the respondents contending that the petitioner ha established higher wages on the project and that they wer entitled to be reimbursed such increase as an added cost The final change order No. 1 covering the foundations wa revised and reissued by the Assistant Administrator o June 25, 1936 after the respondents' work had been sub stantially completed and did not include the wage increas in dispute, but reserved to the respondents their right t prosecute their claim. (Fdg. 14; R. 28)

The respondents appealed to the Assistant Administra tor of Public Works, who rendered a decision on June 29 1936 and with reference to the claim for increased wages decided that the respondents were entitled to $909.00 bu that the payment thereof was dependent upon the opinio of the General Accounting Office and should be submitte to it. (Fdg. 16; R. 30)

On February 12, 1937 the respondents appealed to th Federal Emergency Administrator of Public Works, th head of the Department, and petitioned him for a decisio of their claim. (Fdg. 17; R. 30)

On May 20, 1937 the Hon. Harold L. Ickes, Federa Emergency Administrator of Public Works, after consid ering the respondents' appeal, addressed a letter to th Comptroller General, in which he denied the respondents

claim for increased wages, except in the sum of $909.00. In his report to the General Accounting Office he stated in part as follows:

> "I *understand* that the minimum rates specified are in accordance with those set forth in an agreement entered into between the Building Trade Employers' Association and the Unions of the City of Chicago. I do not have at my disposal a copy of this agreement, which I *understand* established the rate contractors were to pay as wages up to and including January 1, 1936. I *understand* that the contractor is a member of this Association and had in his possession a copy of the agreement with the Unions prior to the time of his bidding. The Government had no way of knowing what minimum rates would be established after January 1, 1936, as the Unions and the Building Trade Employers' Association had not established the rates for the year 1936 at the time the foundation work was bid upon. . . . Furthermore, I *am of the opinion* that the Contractors in the City of Chicago were advised by the Union that on January 1, 1936, the wages in the old agreement would be cancelled and higher wages would be established after January 1, 1936." (Italics Supplied) (Fdg. 18; R. 31)

The statement made in the above quoted letter that the labor rates of wages provided for by the agreement between the Building Trade Employers' Association and the Unions of the City of Chicago terminated January 1, 1936, and that thereafter higher rates were to be established, was an error. The agreement between the Building Trade Employers' Association and the Unions fixing rates of wages did not expire until May 31, 1936. (Fdg. 19)

Three of the four judges hearing the case decided that all of the proof showed that the laborers would not have struck except for the government's action in establishing a higher minimum wage on the *very same building* on which the respondents' laborers were employed, and that the petitioner must have known that this would be the necessary consequence of its act, and further held that under Article

15 the parties did not agree in advance of any dispute to waive their right to sue for breach of the contract and to leave the final determination of any controversy to the decision to one of the contracting parties.

The judgment in favor of Respondents included $4,660.83 for increase of wages (R. 40) and of that amount $3,751.83 is the only part of the judgment which the Petitioner seeks to have reversed (B. p. 7).

Summary of Argument.

1. Article 15 was not intended to apply to the question of whether the Government's acts had caused the contractor to pay higher wages.

2. That if article 15 was so intended, then it could not validly be agreed to by the parties.

3. That the Government did establish different wage rates and is liable to the Respondents for the increase.

Argument.

1.

Article 15 not intended to apply to the question of whether the Government's acts had caused the contractor to pay higher wages.

Article 15 of the contract provides in part as follows:

> "Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the Contracting Officer or his duly authorized representative, subject to written appeal by the Contractor within 30 days to the head of the department concerned, or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the Contractor shall diligently proceed with the work as directed." (R. 23)

Harold L. Ickes, Federal Emergency Administrator of Public Works, in his letter to the Comptroller General made certain findings of fact and then stated his *opinion* as follows:

> "I am of the opinion that this claim should be disallowed in its entirety, as I find that the acts of the Government, in advertising for the superstructure contract and in the establishing rates for that contract on February 15, 1936, did not increase the wage rates that the Contractor was obligated to pay, and that wages were increased because of the expiration on January 1, 1936, of the agreement with the Unions, and the signing of a new agreement. Furthermore, I am of the opinion that the Contractors in the City of Chicago were advised by the Unions that on January 1, 1936, the wages in the old agreement would be cancelled and higher wages would be established after January 1, 1936." (R. 32-33)

Because of the foregoing the Government argues that the Court is without power to grant the respondents relief, upon the theory that the letter of Mr. Ickes to the Comptroller General was a decision by the head of the department as contemplated by article 15.

In the outset it is interesting to note that the Government in its brief before the Court of Claims took the very definite position that the recommendation of Mr. Ickes was not binding on either party to the contract and we quote from that brief:

> "Furthermore, Secretary Ickes' views with respect to plaintiffs' claim were immaterial, since he was not deciding an appeal from the ruling of the contracting officer pursuant to Article 15 of the contract, but was merely making an administrative recommendation to the Comptroller General which was not binding upon either plaintiffs or defendant, and which had no effect whatever upon plaintiffs' right of recovery."

We are entirely in agreement with the foregoing that Secretary Ickes was merely making an administrative rec-

ommendation to the Comptroller General which was no binding upon either of the parties to the contract. He was not making a decision as contemplated by article 15 and he did not so consider himself as doing so, as he concludes his letter as follows:

> "The balance of the enclosed voucher in the amount of $21,823.19 is referred to you for direct settlement *without my certification*, but it is my recommendation that, in addition to the amount I have certified as being due under the contract, the Contractor be reimbursed for the individual items recommended in settlement of this claim." (R. 34) (Italics supplied)

If this letter of the head of the department to the Comptroller General was a decision as contemplated by article 15, why was it not "final and conclusive upon the (Government) parties"? If Secretary Ickes thought he was making a decision under article 15, why did he submit it "without my certification," and why was this decision, which the Government now says was "final and conclusive upon the parties", not carried out by the Comptroller General? The Comptroller General did not consider it final and conclusive upon the parties, as he refused to authorize payment of any of the controverted items, (R. 34) notwithstanding the fact that Secretary Ickes had made recommendation that certain of them be paid. Was his letter a decision under article 15 and therefore final and conclusive as to the contractor but not such a decision when applied to the Government?

It is true that the Government now advances the proposition that the letter of Secretary Ickes allowing $909.00 for excess wages was conclusive under Article 15, and therefore the respondents are entitled to that amount (B. 7), but that was not its position in the Court of Claims where it stated in no unmistakable terms as follows:

> "As we have shown above, however, pages 91-93, the letter of the head of the department to the Comptroller General was not a ruling upon an appeal pursuant to

Article 15 of the contract; it was merely an interdepartmental recommendation which was not and did not purport to be an interpretation of the contract binding upon either plaintiffs or defendant. This is further obvious from the fact that the head of the department declined to certify as due to plaintiffs the amount of their damages which he found due to delay, for if he had considered that defendant was obligated to pay this amount as an equitable adjustment under Article 3 of the contract, he would have certified such damages as due under plaintiffs' final voucher."

The Government argues that under Article 15, there is lodged with the head of the department the sole right to make final and conclusive decisions on *all* questions whether they be questions of fact or of law, such as whether or not there has been a breach of a contract, but cites no cases by this Court or any other Court so holding.

Petitioner argues that both parties proceeded in the belief that Article 15 prescribed the applicable administrative procedure, the dispute being submitted to and passed upon by the contracting officer, Assistant Administrator and finally by the head of the department and that the meaning given to it by both parties would be dispositive, and then cites certain authorities to support this view. Of course the Respondents recognized that so far as procedure was concerned, they must follow the terms of the contract, as this Court has held on many occasions that " * * * the appeal provisions of the contract must be exhausted *before relief is sought in the courts.*" *United States* v. *Blair* 321 U. S. 730. (Italics supplied).

As stated by Judge Whitaker in his opinion:

"Here the agreement, as construed by the defendant, is to leave the settlement of the dispute not to arbitrators but to an agent of one of the parties. It is an agreement to leave to the party who made the contract the determination of whether or not it had breached it. "If Article 15 is to be given such a broad scope, then an aggrieved contractor is denied access to this court save only in those cases where the decision of the con-

tracting officer on whether or not he has breached his contract is arbitrary or capricious or so grossly erroneous as to imply bad faith. Such an agreement would be contrary to the Act of Congress giving its consent that the United States might be sued." (R. 39)

Further on he states:

"We are of the opinion that they (Government) intended to demand only that the contracting officer should decide questions of fact arising as the work progressed, such as the proper interpretation of the requirements of the contract documents, the fitness of the materials, and the sufficiency and amount of the work etc. Article 15, providing for decisions by the contracting officer, concludes, 'In the meantime the contractor shall diligently proceed with the work as directed.' This clearly indicates they had in mind only those disputes that arose during the progress of the work. It negatives the idea that after the contractor had done all the work required of him, the contracting officer should decide whether or not he had been paid all he was entitled to." (R. 39-40)

On this question Judge Madden in his concurring opinion states as follows:

"Since the Contracting Officer cannot make a decision effective against the Government, that the Government has breached its contract, and since if he did so, we would not be bound by it, he frequently does not decide the question at all if his decision would be against the Government. This means that, in practice, the contractor, if he meant, by agreeing to Article 15, to lodge in the Contracting Officer the power to decide questions of breach of contract, has given that official power to decide cases against him, but no power to decide cases effectively in his favor. No contractor in his right mind would ever intend to do that. And no Government official, in drawing a contract, would intend to include in it such an unconscionable provision. . . . I therefore agree with the court that Article 15 was not intended to give to the Contracting Officer the power of decision which the Government claims for him, and that we are not foreclosed from deciding the case." (R. 41)

We submit first, that Secretary Ickes was not making a decision as contemplated by Article 15, and second, that a fair and natural interpretation of Article 15 is that it relates to questions of fact and does repose in the head of the department the absolute right to make decisions on questions of law, such as whether or not there has been a breach of contract, as to hold otherwise would leave solely to the party who may have breached the contract the right to decide whether or not it had breached it.

Analysis of authorities relied upon by petitioner.

Petitioner cites various decisions by this Court and claims that the present decision of the Court of Claims is in conflict therewith, and thus bases its reason for claiming that the Court of Claims should be reversed.

An examination of the decisions cited will disclose that the present decision of the Court of Claims is not in conflict therewith and, therefore, there is no grounds for reversal.

Kihlberg v. United States, 97 U. S. 398.

This suit involved a contract between the parties for the transportation of government stores and supplies, the contract providing that payment was to be made in all cases according to the distance from the place of departure to that of delivery, and that the Chief Quartermaster *was to fix the distances which should govern in the settlement of the contractor's accounts for transportation.* This Court decided that under the circumstances in that case there was no inference that the Chief Quartermaster did not exercise the authority given him with an honest purpose to carry out the real intention of the parties.

United States v. Gleason, 175 U. S. 588.

This case involved a contract which contained a provision that if the contractor should by freshets, ice or other force or violence of the elements and by no fault of his

own be prevented from commencing or completing the work or delivering the material at the time agreed upon in the contract, such additional time "may" in writing be allowed the contractor for such commencement or completion *as in the judgment of the contracting officer, or his successor shall be just and reasonable.* The Court below construed the foregoing word "shall" instead of "may". This Court disagreed with the lower Court and decided that so long as the engineer was not guilty of bad faith or of mistake or negligence so gross as to justify inference of bad faith, the judgment of the engineer was final.

United States v. *Callahan Walker*, 317 U. S. 56, 58.

This case involved a Government construction contract. A dispute arose concerning extra work, but the contractor did not appeal to the head of the department, as provided in article 15. The Court of Claims held that the contracting officer paid no attention to article 3, and that an appeal to the head of the department was not necessary. This Court disagreed and held that if the questions were erroneously determined by the contracting officer, the contractor's remedy was by way of appeal to the head of the department as provided by article 15.

United States v. *McShain*, 308 U. S. 512.

In this case a dispute arose between the contractor and the contracting officer with respect to the proper interpretation of the plans and specifications. The Court of Claims decided in favor of the contractor, and the question presented by the petition for writ of certiorari was as follows:

> "Whether the Court of Claims properly disregarded the decision of certain governmental officers upon the *interpretation of the plans and specifications*, when the Court made no finding of gross error sufficient to imply bad faith." (Italics supplied)

This Court granted certiorari and in a Per curiam decision reversed the Court of Claims

United States v. *Blair*, 321 U. S. 730.

This case arose out of a government contract.

The Contractor had not availed himself of the appeal provisions of the contract found in Article 15, and this Court held that said ***appeal provisions must be exhausted before relief is sought in the Courts*** as there was no finding or evidence that appeal to the head of an appropriate department would have been futile or prejudicial.

2.

That if Article 15 was so intended, then it could not be validly agreed to by the parties.

In the event this Court decides in favor of the respondents on the first question then there is no need of considering the second question presented.

Assuming for the time being that Article 15 was intended to apply, that is to give the head of the department the *absolute* right to decide *all* questions arising under the contract, whether factual or legal, and whether either party had breached the contract, then it is clear that such an agreement could not be validly entered into by the parties.

The petitioner argues that a claimant is free to resort to the courts, the only effect of such a stipulation being to narrow the field of judicial inquiry. If the petitioner's contention is correct, that the decision of the head of the department on *all* disputes concerning questions arising under the contract is final and conclusive, and binding upon the parties, then the field of judicial inquiry is not narrowed, *but entirely eliminated*.

In approaching this question we must first look to the statutory authority for hearing and determining claims founded upon contracts with the United States. By Act of Congress of February 24, 1855, Judicial Code Sec. 145, (28

U. S. C. 250) there was created the Court of Claims, which Act provided in part "—the said court shall hear and determine all claims founded upon * * * any contract, express or implied, with the Government of the United States. * * *" That is the statutory authority for the hearing and determining of claims against the United States growing out of a contract. Congress having set up a court for the purpose of hearing and deciding such claims it is beyond the power of same officer of the Government to so draft a contract as to take away from that court the authority given it by Congressional Act.

If the petitioner's contention is correct then the right given by the Act of Congress to sue in the Court of Claims is taken away. A provision in a contract which gives to one of the parties the absolute right to determine all questions which may arise, and takes away from the other party any and all rights to question the correctness of the decision of the other party on all questions, is clearly void.

Insurance Co. v. *Morse*, 20 Wall. 445, 450, et seq.; *Doyle* v. *Continental Ins. Co.*, 94 U. S. 535, 537; *Guaranty Trust Co.* v. *Green Cove R. R.*, 139 U. S. 137, 142; *Martin* v. *B. & O. R. R.*, 151 U. S. 673 684; *Terral* v. *Burke Construction Co.*, 257 U. S. 529.

Judge Whitaker in his opinion on this phase of the matter states in part as follows:

> "If Article 15 is to be given such a broad scope, then an aggrieved contractor is denied access to this court, save only in those cases where the decision of the contracting officer on whether or not he has breached his contract is arbitrary or capricious or so grossly erroneous as to imply bad faith. Such an agreement would be contrary to the Act of Congress giving its consent that the United States might be sued. On February 24, 1855, Congress passed an Act creating the Court of Claims and said, '*the said court* shall hear and determine all claims founded upon * * * any contract, express or implied, with the Government of the United States. * * *" (Italics supplied.) This provisions is the law today. Section 145 of the Judicial Code; sec.

250, Title 28 U. S. C. It was the law when this contract was entered into. Can it be said that if was in the power of any officer or agent of the Government to set aside this Act of Congress and to say that the contracting officer, and not the Court of Claims, "shall hear and determine all claims founded upon [this] contract"? Such a provision is contrary to the law established by Congress and, therefore, is void.

Not only is it beyond the power of a party to bargain away this right given by Congress, but it must be borne in mind that bidders on this work were forced to enter into this sort of an agreement. The Government contends that as to this project this governmental agency said, the right given by Congress to sue in the Court of Claims is hereby taken away; an aggrieved contractor can secure redress only by appealing to the contracting officer; he will decide whether or not we have paid you all we promised to pay." (R. 39)

Judge Madden in his concurring opinion on this question stated as follows:

"And if both of them did, with their eyes open, intend any such agreement, we would feel bound to conclude that the law permitting Government agents to make contracts, and the statutes giving to a victim of the Government's breach of contract the right to sue in this court, do not authorize an agent of the Government to defeat that right by making such an unconscionable bargain about it." (R. 41)

* * * * * * * * *

"But what the Government here urges, the power in the Contracting Officer to decide the ultimate question of whether his principal has breached its contract, should not be tolerated." (R. 42)

Petitioner argues that whether the Government committed a breach of the contract was an issue, which in a law action would be left to the jury, and then cities certain cases, in which the circumstances were such, as shown by the evidence, that it was proper for the question to be submitted to the jury. In the present case, according to the evidence

there is no dispute as to the facts, and upon those undisputed facts the Court of Claims has decided there was a breach of the contract. But aside from the foregoing, submitting to a jury the question of whether there has been a breach of contract, is entirely different then claiming you can legally repose in one party to a contract the absolute right to decide whether or not *he* has breached the contract.

It further states that considerable safeguards attach to the decisions of the head of a government department or agency, who is responsible to the Chief Executive, and to the Congress, and the assumption must be that he will ordinarily decide controversies fairly and with the regard to the just rights of the contractor. We are quite at a loss to understand to just what safeguards the Petitioner refers, when it contends, as it does in this case, that the decision of the head of the department on *all* questions is final and conclusive. But we agree there are safeguards, and those safeguards are the United States Courts to which Congress has given claimants the right to seek relief from unfair decisions made without regard to the rights of contractors.

We submit that if it was intended that Article 15 should have the broad meaning claimed by the Petitioner, then it was illegal and not binding on the Respondents, and that the Court of Claims had the right to hear and determine their claim.

Analysis of authorities relied upon by Petitioner.

Martinsburg & Potomac R. R. Co. v. *March*, 114 U. S. 549, 553-554.

This was a suit to recover a balance claimed to be due plaintiff on a contract for grading and masonry on a section of a railroad contract, which provided among other things that whenever the contract shall be completely performed on the part of the contractor and the defendant's engineer shall certify the same in writing, together with his

estimates, the company shall within thirty days after receipt of such certificate pay to the contractor the amount due. The declaration contained a copy of the contract but did not contain an allegation that the engineer had ever certified in writing the complete performance of the contract, together with an estimate of the work and the amount of compensation due the contractor according to the prices established by the parties. The defendant demurred to the declaration, which was overruled. This Court held that the demurer should have been sustained for the reason that the parties had agreed that the certificate of the company's engineer was necessary, and there was no allegation that the engineer had been guilty of fraud or such gross mistake as to imply bad faith, or had failed to exercise honest judgment in discharging his duties. The declaration did not state facts entitling the plaintiff to sue the company in the absence of such a certificate.

Plumley v. United States, 226 U. S. 545-547.

This was a suit by a contractor for extra work and damages for delay. The contract provided that if there was any discrepancy *between the plans and specifications or between the contract of McLaughlin* (previous contractor) *and the contractor*, Plumley, the matter should be referred to the Secretary, the plaintiff agreeing to abide by his decision in the premises. The Secretary decided against him and this Court held that under the circumstances his construction was binding on the contractor.

Merrill-Ruckgaber Co. v. United States, 241 U. S. 387.

This was a suit by a contractor for extra work, the contract providing that the decision of the Supervising Architect *as to the proper interpretations of the drawings and specifications* should be final. There was a disagreement between the parties and the contractor applied to the Secretary of the Treasury, who confirmed the action of the Architect. This Court, in deciding in favor of the govern-

ment, held that there was no intimation of unfairness on the part of the Supervising Architect and that there was no attempt to impugn the good faith of the Secretary of the Treasury who sustained the decision of the Architect, and that the contract explicitly provided that the decision of the Supervising Architect as to the proper interpretation of the drawings and specifications would be final.

Goltra v. *Weeks*, 271 U. S. 536.

This was a suit by the plaintiff to enjoin seizure of a fleet of tow-boats and barges which had been held by him as lessee. He charged a conspiracy to unlawfully deprive him of the boats. The Secretary of War had notified the lessee that in his judgment the lessee had not complied with the terms and conditions of the contract in that he failed to operate the boats as a common carrier and in other particulars and declared the contract terminated. The contract provided that the government reserved the right to make certain inspections and that non-compliance in his judgment with any of the terms and conditions of the lease would justify the termination of the lease. The evidence showed that from the time the plaintiffs got the boats they were not in use but were tied up except for the transportation of two small cargoes, and the bill of complaint admitted that the plaintiff had not fulfilled his covenant to operate as a common carrier. The plaintiff was given notice on March 4 of the termination and answered on March 8, but he tendered no facts upon which either the Secretary or Chief of Engineers could have any different conclusion from that already reached from the failure of the plaintiff to fulfill his obligation. Under the circumstances this Court dissolved the injunction.

United States v. *Esnault-Pelterie*, 303 U. S. 26.

This was suit brought in the Court of Claims claiming infringement of a patent by the United States. There was a judgment for the respondent in the Court of Claims. This

Court in affirming the Court of Claims, points out that the United States can only be sued for infringment in the Court of Claims by Act. of Congress, and that review by this Court of judgments of the Court of Claims, was under such regulations as this Court shall adopt, and that such regulations provide that the duty is upon the Court of Claims to resolve conflicting inferences and to draw from the evidence the necessary conclusions of fact. We fail to see where this case has any application to the question under discussion.

The case of *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, was a case involving a ruling by the Federal Communications Commission, and that of *Shields et al* v. *Utah Idaho Central Railroad Co.*, 305 U. S. 177, involved a determination by the Interstate Commerce Commission, both Commissions being created by Acts of Congress, wherein they were given authority to make certain rulings and determinations. The questions involved in each was whether or not the rulings and determinations made were beyond their authority and this Court rightfully held that the rulings and determinations made in conformity with the Act of Congress were binding on the parties. We fail to see the applicability of these cases as well as *Gray* v. *Powell, infra*, as there has been no Act of Congress giving to the head of the department the right to decide all questions involved in a Government contract, on the contrary, that right has been given by Act of Congress to the Court of Claims.

Ripley v. *United States*, 223 U. S. 695.

This was a suit by a contractor for damages sustained by carrying out a contract to build a jetty. The contract provided that certain blocks should be laid on the jetty as the work progressed and *when in the judgment of the United States Agent in Charge the case or mound has sufficiently consolidated*. The Agent refused to permit the contractor to lay the blocks at certain times, causing the

contractor additional costs. This Court held that no matter how long the delay or how great the damage he was not entitled to recover unless the refusal was the result of fraud or of such gross mistake as would imply bad faith. This is quite different from saying that the decision of the head of the department on *all* questions shall be final and conclusive.

Sweeney v. *United States*, 109 U. S. 618.

This was a suit to recover the costs of a wall built around the National Cemetery at Fort Harrison, Virginia. The contract contained a provision that a representative of the government would be designated to inspect the wall, and after such representative should certify that the wall was in all respects as contracted for it should be received and become the property of the United States.

The representative of the government reported that the wall had been constructed without paying any attention whatever to the instructions given relative to material, nor to the orders given with regard to the gate-posts. That the condemned material was used and that he considered the workmanship unsatisfactory. As a result of the foregoing report the wall was taken down and a new one constructed in its place. No representative of the government ever certified that the wall constructed was in all respects as contracted for by the claimant or in any respect as contracted for. This Court held that the claimant could not recover for the reason that the government representative expressly refused to give the necessary certificate on the grounds that neither the material nor workmanship was such as the contract required, and that there was no showing of any fraud, nor such gross mistake as would imply bad faith, nor any failure to exercise honest judgment, and that the claimant had been notified of the defective character of the material and that it would not be accepted before he put it into the wall.

Milwaukee & St. P. Ry. v. *Kellogg*, 94 U. S. 469.

This was a suit for compensation for destruction by fire of the plaintiff's sawmill. The question involved was whether or not the fire which originated upon the defendant's steamboat was proximate cause of the destruction of the plaintiff's sawmill. The defendant requested an instruction that the injury sustained by the plaintiff was too remote from the negligence of the defendant to afford a ground for recovery, which instruction was denied, and the question was left to the jury. This Court, in deciding in favor of the plaintiff, held that the true rule is that what is the proximate cause of an injury is ordinarily a question for the jury.

United States v. *Mason & Hagner*, 260 U. S. 323.

This case involved a "cost plus contract" and provided that the contractor should be reimbursed for all expenditures as should be approved by the contracting officer. The item in dispute was for premiums, the War Department having decided that it was a proper charge against the contract, while the Comptroller of the Treasury Department had disallowed the item. This Court held that as the War Department had approved the item, as it had a right to do under the contract, the Comptroller of the Treasury had no power over the decision of the War Department, which was exercised in accordance with the terms of the contract.

Gray v. *Powell*, 314 U. S. 402.

This was a suit by the Receiver of the Seaboard Air Line Ry. for an exemption of certain coal from Bituminous Coal Code on the ground that they were both producer and consumer of the coal. A hearing was had before the National Bituminous Coal Commission, which was later changed to the Bituminous Coal Division, and an order was entered denying exemption. Upon review there was a decree re-

versing the Director's order and this Court affirmed the decree below. The decision was upon a petition for rehearing and this Court reviewed the conditions of the contract under which the coal was obtained by Seaboard as well as the various legislative enactments which sought to bring about a solution of the economic difficulties of the soft coal industry. The question involved was whether the Director's findings that Seaboard was not a producer of coal was to be sustained. This Court, after reviewing the Bituminous Coal Act and the provisions therein which provided for the determination by the commission and the review thereof by the Court, stated as follows:

> "In a matter *left specifically by Congress to the determination of an administrative body*, as the question of exemption was here by §§ 4-II(1) and 4-A, the function of review placed upon the courts by § 6 (b) is fully performed when they determine that there has been a fair hearing, with notice and an opportunity to present the circumstances and arguments to the decisive body, and an application of the statute in a just and reasoned manner." (Italics supplied)

Burchell v. *Marsh*, 17 How. 344.

This case involved a bill in equity to set aside an award of arbitration as fraudulent and void. The answer denied the arbitrators acted unjustly but on the contrary acted justly, fairly and with due consideration for the rights of the parties. The matter was submitted on bill and answer. The lower Court set the award aside. This Court reversed the lower Court, stating that they were of the opinion that the record furnished no evidence of corruption or misbehavior in the arbitrators nor of ignorance as charged in the bill, or of any mistake which would justify the Court of Chancery in annulling it.

Comb v. *United States*, 100 Court of Claims 240.

In this case, which involved a construction contract, the question involved was that of furnishing temporary heat.

The contract provided that if there was no existing system to connect to, the contractor should supply sufficient heat by connecting up the boiler to be installed in the building or by other means approved by the Superintendent of Construction. The Superintendent of Construction refused to permit certain connections to be made. The contractor protested to the Commissioner of Indian Affairs, who sustained the Superintendent. Whereupon, the contractor applied to the head of the Department, who reversed the decision of the Superintendent and directed that a voucher be prepared to cover the costs incurred by the contractor. The Comptroller refused to pay on the ground that the decision of the contracting officer was final and conclusive. The Court of Claims held that the Comptroller was wrong, as he gave no consideration to the contractor's right of appeal to the head of the Department.

We again submit that there is nothing in the foregoing decisions which is in any way contradictory to the decision of the Court of Claims or applicable to the present question, and granting a writ of certiorari is not justified.

3.

That the Government did establish different wage rates and is liable to the Respondents for the increase.

1.

There can hardly be any doubt that the only reason the Respondents were compelled to pay the higher rates was because the Federal Emergency Administration of Public Works increased the rates. The record is conclusive that the rates provided for in the specification of the foundations were the rates prevailing in Chicago at the time, and that these rates remained in force on work other than PWA projects until May 31, 1936. Had the Federal Emergency Administration of Public Works not announced the higher rates in the specifications for the superstructure on Feb-

ruary 15, 1936, no question would have been raised by the Respondents' workmen, and the job would have been completed at the prevailing rates, which were the rates inserted by the Petitioner in the specifications of the Respondents' contract.

Mr. Ickes, in his report dated May 20, 1937 to the Comptroller General of the United States, admits that the Respondents did pay increased wages as claimed herein, but attempts to excuse the Government from payment thereof by saying that while he does not have at his disposal a copy of the agreement between the Building Trade Employers' Association and the unions of the City of Chicago, he *understood* that the minimum rates specified (in the contract for the foundation) are in accordance with those set forth in said agreement, and that he *understood* it established the rate the contractors were to pay as wages up to and including January 1, 1936.

Aside from the fact that the foregoing statements by Mr. Ickes are mere assumption and could hardly be called findings of fact, they are not correct, for the reason that the only evidence in the case shows that the rates, as provided for in the specifications of the contract for the foundations, were in effect between the unions and the Building Trade Employers' Association up to and including May 31, 1936. (Pltfs. Ex. 23.)

Mr. Ickes further states in his report that the Government had no way of knowing what minimum rates would be established after January 1, 1936 and that the contractor should have been guided by the unions' agreement and to have provided in his bid against any possible increase in wages over and above the minimum specified. This is exactly what the Respondents did. They knew that there would be no change in the rates as provided for by the agreement between the unions and the Building Trade Employers' Association until May 31, 1936 and that the contract provided that in the event any increase was established by the Federal Emergency Administration of

Public Works the contract price would be adjusted accordingly. They did do exactly what Mr. Ickes said they should have done in order to protect themselves.

Mr. Ickes' sole reason for disallowing the claim is based upon his *opinion* that the rates provided for by the agreement between the Building Trade Employers' Association and the unions of the City of Chicago terminated January 1, 1936 and that thereafter higher rates were to be established. Here again Mr. Ickes, aside from speculating, is making a statement contrary to the facts. As stated above, the only evidence in the case, and the fact of the matter is, that the rates between the Building Trade Employers' Association and the Union did not change until May 31, 1936.

Petitioner states that the Building Trade Employer's Association of which Respondents were a member, had an agreement with the construction unions in Chicago for the same minimum wage rates as those specified in Respondents' contract. That this agreement was in effect when the contract was made and was not to expire until May 31, 1936, three months after the job was originally scheduled to be finished and 12 days after it was actually completed. That it was necessary that the Government call for bids and enter into a contract for the superstructures in advance, so that work upon them could commence without delay immediately after respondents completed the foundations, but that the increased wage rates specified therein were not to take effect until after Respondents' contract was completed. We do not see how that statement adds any strength to the Petitioner's position as it admits that agreement with the constructions unions in the City of Chicago was not to expire until three months after the job was originally scheduled to be finished. The delay in completing was not due to any acts of the Respondents but on the contrary to acts of the Petitioner. While the contract was dated November 26, 1935, the respondents, by letter dated November 21, 1935, were requested to proceed

with the work, and as the contract provided for its completion within 75 calendar days, in the normal course of events the contract would have been completed in the early part of February, 1936, prior to the time when the specifications were issued for the superstructures, in connection with which the higher rates of wages were established, but that due to changes made by the petitioner the respondents were ordered to stop work on December 10, 1935 and were not able to proceed until February 26, 1936, after the specifications for the superstructures had been issued. (February 15, 1936.)

Judge Whitaker in his opinion on this phase of the case states as follows:

> "The contract was entered into on November 26, 1935, but defendant held up the work until February 17, 1936, when it gave plaintiffs notice to start work; however, work was not begun until February 28, 1936, due to bad weather. *While the work was under suspension* the defendant on February 15, 1936, asked for bids on the construction of the building above the foundation. (Plaintiffs' contract was for the foundation only.) This advertisement for bids required bidders to pay a minimum wage to the before-mentioned laborers higher than was provided for in plaintiffs' contract. A successful bidder on this part of the building could not pay common laborers less than 95 cents an hour, instead of the 82½ cents on the foundation contract, and could not pay carpenters, cement finishers, and hoisting engineers less than $1.50 per hour, instead of the minimum of $1.31¼ on the foundation contract.
>
> "Whereas on November 26, 1935, the Government thought not less than $1.31¼ was a fair wage for carpenters, cement finishers, and hoisting engineers, and 82½ cents for common laborers, by February 15, 1936, conditions had changed to such an extent that it no longer considered these fair wages and demanded of the superstructure contractor the payment of higher wages.
>
> "Plaintiffs' work did not commence until after this change in the wage rate. So, when the offered to pay

their carpenters, cement finishers, and hoisting engineers $1.31¼, and common laborers 82½ cents, these men very naturally said, no, the Government has said that no less than $1.50 and 95 cents is fair; and when plaintiffs would pay no more, they struck. In order to induce them to work plaintiffs had to pay the $1.50 and 95 cents.

"All the proof goes to show the laborers would not have struck except for the Government's action in establishing a higher minimum wage on the very same building on which plaintiffs' laborers were employed.

"That they should have struck was well-nigh inevitable. They had no contract with plaintiffs to work at any fixed wage and, so, when their Government said that the least that ought to be paid for such labor was more than plaintiffs offered, of course they demanded the amount fixed by the Government as fair and refused to work for less.

"So, while the defendant did not expressly demand of these plaintiffs that they pay a higher minimum wage on their contract, it nevertheless brought about conditions that made this almost inevitable, and it must have known that this would be the necessary consequence of its act. Just as effectively as though it had directly ordered plaintiffs to pay a higher wage, it indirectly required them to do so." (R. 35-36) (Italics supplied.)

"We are of opinion that the defendant in fact established different wage rates on plaintiffs' job, and, therefore, it is obligated to pay the increase under article 19.

"But whether or not this is so, it is an implied condition of every contract that neither party will hinder the other in his discharge of the obligations imposed upon him, nor increase his cost of performance. *Restatement of the Law of Contracts*, sec. 315 (1); *Williston on Contracts*, sec. 1293 A; *Anvil Mining Co. v. Humble*, 153 U. S. 540, 551. It was an implied condition of this contract that the Government would not do any act that as a necessary consequence would make performance by the plaintiffs more expensive. The Gov-

ernment breached that implied condition by increasing the minimum wage to be paid on a part of this building, which as a necessary consequence required plaintiffs to pay more wages than those specified.

"It follows that the defendant is liable for the increased wages plaintiffs had to pay." (R. 36-37)

We submit that the Federal Emergency Administrator of Public Works did establish different wage rates, which resulted in the Respondents being required to pay the increases in wages for which the Petitioner was liable.

2.

Secretary Ickes admits that the increased wages incurred by the plaintiffs due to the act of the government prohibiting the Respondents from starting the work is a fair and just charge against the government. (R. 33) The only dispute under his theory of the claim is the basis for arriving at the amount due from the Petitioners to the Respondents.

Mr. Ickes proceeds on the theory that the Respondents should be reimbursed for the increased wages paid by them during the 26 days following the proceed order of February 17, 1936. He arrives at this 26 days by using the stop order date of December 12 up to and including January 8, which is the date the higher wages went into effect. He then takes the total hours in the first 26 days following February 17, based on the plaintiffs' pay rolls, and finally arrives at a gross figure of $909.

As against the foregoing method adopted by Mr. Ickes we have the very direct testimony of the Respondents, first, that had they been permitted to proceed with the contract on November 21 they would have been able to complete it within the time specified in the contract, namely, 75 days. This would bring the date of completion of the contract to approximately February 3, 1936, and as the specifications for the superstructure were not issued until February 15, 1936 the contract would have been entirely completed be-

fore those increasd rates were publishd, and the Respondents should, therefore, be reimbursed to the full extent of the increased wages which they were compelled to pay, amounting to $4,660.83.

Assuming for the time being that the correct date to begin with is December 12 (the date when the Respondents received the stop order), here again we have the situation where they had 75 days within which to complete the work from December 9, 1935, and there is no reason to believe, and nothing in the testimony to the contrary, that the Respondents could not have completed the contract within 75 days. This would bring us to a date of February 24, 1936, when the contract would have been completed, and as the demand for increased wages was not made until sometime in February or March it is reasonable to assume that the contract would have been completed before the Respondents' employees struck for higher wages and there would have been no occasion to have gone back and paid them any increased wages whatsoever. Here again the showing is clear that the Respondents should be reimbursed to the full extent of the increased wages amounting to $4,660.83.

Again assuming for the sake of argument that the correct period to be taken into consideration is December 10 to January 8, we have the very positive testimony of the Respondents that had they been permitted to perform the contract during that period they could have completed from 35 to 40 per cent of their work, upon which basis they would be entitled to recover at least one-third of the increased wages, or the sum of $1,856.08, as against Mr. Ickes' figure of $909.

The Petitioner will probably argue that the testimony of the Respondents that they could have completed the contract within 75 days from November 21, 1935, is without any basis, but the fact of the matter is that they entered into a formal contract with the Petitioner, wherein they agreed to perform the work within 75 days, and there is

nothing in the case to indicate that they could not have done so. The fact that the government inserted in the contract the requirement that it was to be completed within 75 days shows conclusively that the Petitioner also expected the work to be done within that time.

With reference to the Respondents estimate that they could have performed from 35 to 40 per cent of the work between December 10 and January 8, it must be borne in mind that they were obligated to perform the entire contract within 75 days, and who would be better qualified than they to estimate the amount of work they would have completed within that period. In addition, between December 10 and January 8 there were 29 days, or over 38 per cent of the entire time within which the contract was to be performed, and it is not only a fair presumption but a logical one that they certainly would have completed not less than one-third of the work within the first 29 days.

In view of the foregoing it is submitted that upon this theory of the case the Respondents are entitled to recover the full amount they expended in increased wages of $4,660.83, and certainly in no event less than $1,856.08.

Analysis of authorities relied upon by Petitioner.

Petitioner cites two decisions of the Court of Claims in support of its contention, the first being *Le Veque, et al v. United States*, 96 Court of Claims 250, in which case the Court of Claims held that the establishment by the government of higher wages on another project in another part of the city did not require it to pay the increased wages upon the plaintiff's contract, and concluded that the increase in wages paid by the plaintiff in that case was not a necessary result of the government's act. The Court of Claims, in its decision in the present case, considered its decision in the Le Veque case, but pointed out that the facts in the present case were entirely different; that the increased wages in the present case were on the very same building on which the respondents were working, and con-

cluded that in the present case the government did in fact establish higher wage rates on respondents' job.

The other case cited by the petitioner is *Drava Corp.* v. *United States*, 93 Court of Claims 734. It is submitted that this case is not in point for the reason that the suit was brought under the Act of June 25, 1938, conferring jurisdiction upon the Court of Claims to hear and determine and enter judgment against the United States on behalf of contractors who had contracts with the United States and whose costs were increased as a result of the National Industrial Recovery Act. All the Court of Claims decided was that the plaintiff's increased costs were not the result of the National Industrial Recovery Act.

The case of *Alabama Power Co.* v. *Ickes*, 302 U. S. 464, has no application to the present case, as it involved the question of the right of an electric power company operating in the State of Alabama to enjoin the execution of certain loan-and-grant agreements made by the Federal Emergency Administrator of Public Works with four municipal corporations.

Conclusion.

It is respectfully submitted that the Court of Claims correctly decided that the petitioner established different wage rates and was therefore obligated to pay the increase and that the judgment of the Court of Claims should be affirmed.

WILLIAM F. KELLY,
P. J. J. NICOLAIDES,
Attorneys for Respondents.

SUPREME COURT OF THE UNITED STATES.

No. 431.—October Term, 1944.

The United States, Petitioner,
vs.
Joseph H. Beuttas, et al., Trading as B-W Construction Co.

On Writ of Certiorari to the Court of Claims.

[April 23, 1945.]

Mr. Justice Roberts delivered the opinion of the Court.

The respondents executed a contract with the petitioner whereby they agreed to construct the foundations for a public housing project. By Article 19 they agreed that workmen of designated classes should be paid specified minimum wages, and if, during the progress of the work, the petitioner should find it desirable that wages higher than those specified should be paid, it might establish different rates, and in such case the contract price should be adjusted accordingly.

The respondents paid wages higher than those named in the contract, and brought this action, *inter alia*, to recover the difference. They introduced evidence to prove that commencement of the work was suspended by delays on the part of petitioner's officers and by other conditions for which the respondents were not responsible; that during the period of suspension the petitioner asked bids for erection of the superstructure, and by its advertisement required bidders to pay higher rates to the same classes of workmen than the minima specified in the respondents' contract; that when respondents' employees learned of this, they demanded wages equal to those that were to be paid for work on the superstructure; and that to obtain workers and to settle a strike the respondents had to pay such increased wages.

It appears that respondents submitted a claim for reimbursement for the increase in wages to the contracting officer who disallowed it; and then appealed to the Assistant Administrator of Public Works who filed a written decision sustaining the contracting officer's ruling. The Administrator, in turn, rejected the claim. It is urged that the last-named official was in error as to certain

of the facts, but there is no suggestion that he acted arbitrarily or in bad faith.

The petitioner's defense is grounded in certain provisions of the contract and the specifications forming a part of it, and facts found by the court below.

Article 3 provided that the contracting officer might make changes in the drawings and specifications within the general scope thereof; that an equitable adjustment as to any increase or decrease of cost due to such changes by the contracting officer or, in specified cases, his superior, should be made; and that if the contractor was dissatisfied with the decision, the dispute should "be determined as provided in article 15 hereof."

Article 15 is:

"Disputes: All labor issues arising under this contract which cannot be satisfactorily adjusted by the Contracting Officer shall be submitted to the Head of the Department. Except as otherwise specifically provided in this contract, *all other disputes* concerning questions arising under this contract shall be decided by the Contracting Officer or his duly authorized representative, subject to written appeal by the Contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. In the meantime the Contractor shall diligently proceed with the work as directed." (Italics supplied)

Paragraph 4 of Section 12 of Division I of the Specifications stated:

"The Government will not consider any claims for additional compensation made by the Contractor because of payment by the Contractor of any wage rate in excess of the applicable rate contained herein. All disputes in regard to the payment of wages in excess of those specified herein shall be adjusted by the Contractor."

When respondents entered into the contract their employees were unionized and were working under a wage scale fixed by agreement which was in accord with the rates fixed by the contract. This agreement did not expire by its terms until twelve days after respondents completed their work. These workmen struck because they demanded the same wages as were to be paid to workmen under the superstructure contract, according to the advertisement for bids for that work. The petitioner did not participate in the negotiations between respondents and their striking workmen.

The Government's defenses were (1) that the dispute must be decided by the procedure prescribed in Article 15; that it had been

so decided on the respondents' invocation of that procedure; that no showing of fraud or arbitrary action had been made, and that accordingly the administrative decision was final and the Court of Claims without jurisdiction; and (2) that, in any event, no breach of the contract on the part of the Government had been shown. These contentions were overruled by a divided court, and judgment was entered for the respondents.[1]

1. The respondents' contention is that if Article 15 be construed to cover such a dispute it is void as an attempt to oust the jurisdiction of the Court of Claims to decide a pure matter of law, namely, whether on the facts found, the petitioner had broken the contract. A majority of the judges so held, and also thought Article 15 was not intended to cover such a dispute but only one as to changes, interpretation of the specifications and similar matters usually remitted to the judgment of an architect.

The parties devoted much of their argument here to the question whether only questions of fact, or questions of mixed law and fact can by contract be made subject to final determination by an administrative officer of the Government or whether a question of law may also, by contract, be made subject to final determination by such an officer. Our cases have not explicitly drawn any distinction between the two categories.[2] We find it unnecessary to decide the question, for we think it clear that the respondents may not recover for the increased wages in the circumstances of this case.

2. Two of the three judges in the majority below were of the view that the Government had in fact established higher wages for the respondents' work and was accordingly liable to pay the increased cost under Article 10 of the contract. All three judges in the majority held that, in any case, the Government is liable because what it did amounted to a breach of its implied obligation not to render performance more costly to the respondents.

Clearly the petitioner did not expressly avail itself of the option to set higher wage rates for the work covered by the respondents' contract. In the light of the quoted portions of the contract and

[1] — C. Cls. —; — F. Supp. —.

[2] See Kihlberg v. United States, 97 U. S. 398; Sweeney v. United States, 109 U. S. 618; United States v. Gleason, 175 U. S. 588; Plumley v. United States, 226 U. S. 545; Merrill-Ruckgaber Co. v. United States, 241 U. S. 387; United States v. Mason & Hanger Co., 260 U. S. 323; Goltra v. Weeks, 271 U. S. 536; United States v. McShain, 308 U. S. 512; United States v. Callahan Walker Co., 317 U. S. 56; United States v. Blair, 321 U. S. 730.

specifications it cannot be maintained that a recovery is justified pursuant to the covenants of the contract.

As an alternative ground of decision, some of the judges below resorted to the principle that it is an implied condition of every contract that neither party will hinder the other in his discharge of the obligations imposed upon him, nor increase his cost of performance. They held that by inviting bids for the superstructure at minimum wages higher than those fixed in the respondents' contract for the foundations the petitioner breached this implied condition. But, of course, this can be true only if the Government caused the increase in wages. And the findings, in our judgment, render a conclusion to that effect impossible. The Government did not stipulate that the two groups, those employed on the foundations and those employed on the superstructure, should work at the same time at different wages. On the contrary it had every reason to suppose that the former would finish their work at the then agreed rate before the latter came on the work. And this is what happened. There is no finding that petitioner's officers or agents had reason to expect that the fixing of a wage rate under another contract for a separate portion of the work, which was to be commenced after completion of respondents' contract, would cause a breach of their existing wage agreement by respondents' employees. Moreover, it is found that the petitioner took no part in the wage controversy between the respondents and their employees. It follows that there is no basis for a holding that the Government knowingly hindered respondents in the performance of the contract or culpably increased their costs.

There are other items going to make up the amount of the judgment entered by the Court of Claims which are not attacked [redacted] The cause will be remanded for further proceedings in conformity to this opinion.

MR. JUSTICE DOUGLAS concurs in the result.

As to the item of $3,751.83 increased wage costs, the judgment must be reversed; in other respects it is affirmed.